Jackson Engineering Co. *and* Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO and Local 17, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO and Local 1814, International Longshoremen's Association, AFL-CIO, Party to the Contract

Local 1814, International Longshoremen's Association, AFL-CIO *and* Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO and Local 17, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO and Jackson Engineering Co., Party to the Contract. Cases 29-CA-7498 and 29-CB-3966

December 28, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On May 27, 1982, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, Respondent Employer, Respondent Union, and the General Counsel filed exceptions and supporting briefs, and Respondent Employer and Respondent Union filed answering briefs to the General Counsel's exceptions.

The Board has considered the record[1] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found that, during the period from early 1976 until July 1979, Respondent Employer's president, Seregos, made concealed payments totaling approximately $67,700 to Respondent Union's executive vice president, Anastasio, with the full knowledge and approval of Respondent Union's president, Scotto. These payments, which were made in cash at Respondent Union's office, represented a 10-percent kickback from all business referred to Respondent Employer by Respondent Union. The Administrative Law Judge found, and we agree, that by such conduct Respondent Employer violated Section 8(a)(2) and (1) of the Act and Respondent Union violated Section 8(b)(1)(A) of the Act. To remedy these violations, the Administrative Law Judge recommended that a cease-and-desist order issue, finding that setting aside the contract executed on September 13, 1979, was not warranted. We find merit to the General Counsel's exceptions to this latter finding.

The Administrative Law Judge found that the relationship between Respondents had its genesis in mid-1975 when Seregos approached Respondent Union and informed Anastasio that he (Seregos) was interested in unionizing his shop. Thereafter, in mid-July 1975, Seregos told Anastasio that Respondent Employer would become a union shop. On this same occasion, Seregos agreed to Anastasio's proposal that Respondent Employer kick back 10 percent of the proceeds of any business obtained for it through Anastasio's efforts. On July 11, 1975, Seregos, pursuant to Anastasio's instructions, wrote a letter to Prudential Lines, which stated that Respondent Employer was a complete union plant affiliated with the International Longshoremen's Association (ILA) and that its employees were ILA members. In late September 1975, after a majority of employees executed authorization cards for the ILA, Seregos executed a memorandum of understanding with the ILA and began to check off dues and forward them to the ILA. Thereafter, in the fall of 1975, Seregos signed an industrywide collective-bargaining agreement with the ILA effective from November 3, 1975, to November 3, 1978. In early 1976, Seregos began making concealed payments to Anastasio pursuant to their kickback agreement. These payments totaled $15,000 in 1976; $16,000 in 1977; $28,700 in 1978; and $8,000 in 1979. The last such payment amounted to $4,000 and was tendered to Anastasio on July 5, 1979.[3] Meanwhile, during the period that these payments were made, Respondents executed a renewal collective-bargaining agreement carrying effective dates of November 3, 1978, to November 2, 1981. In late June or early July 1979, however, following Respondent Employer's purchase of the Staten Island shipyard facility from Brewer Drydock Company, Respondents commenced negotiations concerning modifications to their collective-bargaining agreement. These negotiations culminated in an agreement reached on September 5, which included, *inter alia*, reductions of wage rates for most employees and reductions in company contribu-

[1] Although none of the parties have objected thereto, we note that the official transcript of proceedings for the October 1980 hearing dates is confusing and duplicative, and, in some instances, contains patently erroneous transcriptions of testimony and arguments of counsel. However, we carefully have reviewed the entire record and find that these errors do not raise any material issues of fact concerning the issues before us. In this regard, we note that the basic facts essentially are undisputed insofar as they relate to the concealed payments which gave rise to the instant 8(a)(1) and (2) and 8(b)(1)(A) charges, and that the transcription errors primarily relate to the *Midwest Piping* doctrine allegations contained in the complaint. See fn. 2, *infra*.

[2] No exceptions were filed to the Administrative Law Judge's dismissal of that portion of the complaint which alleges violations of the standards set forth in *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945). We note, however, that the *Midwest Piping* doctrine recently was modified and redefined by the Board. See *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) (Chairman Van de Water and Member Jenkins dissenting separately), and *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB 955 (1982) (Member Jenkins concurring in the result).

[3] This payment assertedly was for Scotto's "legal defense fund."

tions to employees' pension and hospitalization plans.

Thus, it is apparent from the foregoing that at or about the same time Respondents were negotiating midterm contract modifications granting Respondent Employer economic concessions, concealed payments involving large sums of money were changing hands. We find that these concurrent actions operated to taint and undermine the bargaining relationship between Respondents and the contract which was negotiated by them while the payments were being made. Our conclusion in this regard is not affected by the fact that Anastasio, Scotto, and Seregos personally did not engage in the negotiations which led to the modified contract. Although those individuals may not personally have participated, they were, at all material times, Respondent Union's executive vice president and president and Respondent Employer's president, respectively. Under these circumstances, we do not regard their divorce from the actual negotiations to be determinative of this issue.

In sum, we find that in order fully to effectuate the purposes and policies of the Act, and to assure an adequate remedy for Respondents' serious unfair labor practices, the appropriate remedy in this proceeding is that sought by the General Counsel. Accordingly, we shall order that: (1) Respondent Employer withdraw and withhold all recognition from Respondent Union as the collective-bargaining representative of Respondent Employer's employees, unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees; (2) Respondent Employer and Respondent Union cease giving effect to the September 1979 collective-bargaining agreement, or to any modification, extension, supplement, or renewal thereof, unless and until Respondent Union shall have been certified by the Board; and (3) Respondent Employer and Respondent Union, jointly and severally, reimburse all present and former employees of Respondent Employer, except those who joined or signed authorization cards for Respondent Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after said effective date for initiation fees, dues, or other obligations of membership in Respondent Union,[4] with interest thereon computed in the manner provided in *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)). Nothing in our Order, however, shall be deemed to require Respondent Employer to vary or abandon those wage, hour, seniority, or other substantive features of its relations with employees established in the performance of the aforementioned collective-bargaining agreement, or to prejudice the assertion by the employees of any rights they may have thereunder.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Employer, Jackson Engineering Co., Staten Island, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Entering into, carrying out, or maintaining arrangements with Local 1814, International Longshoremen's Association, AFL-CIO, whereby it makes payments to Local 1814 based upon the percentage of business referred to it by Local 1814, or otherwise contributing financial or other support to Local 1814.

(b) Recognizing Local 1814, International Longshoremen's Association, AFL-CIO, or any successor thereto, as the representative of any of its employees for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified by the National Labor Relations Board.

(c) Performing or giving effect to its contract of September 1979 with Local 1814, International Longshoremen's Association, AFL-CIO, or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Union, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified by the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Local 1814, International Longshoremen's Association, AFL-CIO, as the representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and con-

[4] *Unit Train Coal Sales, Inc.*, 234 NLRB 1265 (1978).

[5] *Sweater Bee by Banff, Ltd.*, 197 NLRB 805 (1972).

ditions of employment, unless and until said Union shall have been certified by the National Labor Relations Board.

(b) Jointly and severally with Respondent Local 1814, International Longshoremen's Association, AFL-CIO, reimburse all of its present and former employees, except those who joined or signed authorization cards for said Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after said effective date for initiation fees, dues, or other obligations of membership in said Union, with interest thereon computed in the manner set forth in this Decision and Order.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its places of business in Staten Island, New York, and Hoboken, New Jersey, copies of the attached notice marked "Appendix A."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph (d) above, as they are forwarded by the Regional Director, copies of Respondent Union's notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for posting at Respondent Union's offices and meeting halls.

(g) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

B. Respondent Union, Local 1814, International Longshoremen's Association, AFL-CIO, Brooklyn, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Entering into, carrying out, or maintaining arrangements with Jackson Engineering Co. whereby it receives payments from Jackson based upon the percentage of business referred by it to Jackson, or otherwise receiving or accepting financial or other support and assistance from Jackson.

(b) Performing or giving effect to its contract of September 1979 with Jackson Engineering Co., or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Employer, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until it shall have been certified by the National Labor Relations Board.

(c) Acting or purporting to act as the collective-bargaining representative of any employees of Jackson Engineering Co. for the purpose of dealing with said Employer concerning wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until it shall have been certified by the National Labor Relations Board.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Jackson Engineering Co. reimburse all of said Employer's present and former employees, except those who joined or signed authorization cards for Respondent Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after said effective date for initiation fees, dues, or other obligations of membership in Respondent Union, with interest computed in the manner set forth in this Decision and Order.

(b) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[7] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[7] See fn. 6, *supra*.

ensure that said notices are not altered, defaced, or covered by any other material.

(c) Post at the same places and under the same conditions as set forth in paragraph (b) above, as they are forwarded by the Regional Director, copies of Respondent Employer's notice marked "Appendix A."

(d) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for posting at Respondent Employer's place of business.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT enter into, carry out, or maintain arrangements with Local 1814, International Longshoremen's Association, AFL-CIO, whereby we make payments to Local 1814 based upon the percentage of business referred to us by Local 1814, or otherwise contribute financial or other assistance or support to Local 1814.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL cease performing or giving effect to our contract with Local 1814, International Longshoremen's Association, AFL-CIO, or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Union, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified as our employees' exclusive collective-bargaining representative by the National Labor Relations Board.

WE WILL cease recognizing Local 1814, International Longshoremen's Association, AFL-CIO, and WE WILL withdraw and withhold recognition from that Union, as our employees' representative for collective-bargaining purposes, until such time as that Union is certified as our employees' exclusive collective-bargaining representative by the National Labor Relations Board.

WE WILL, jointly and severally with Local 1814, International Longshoremen's Association, AFL-CIO, reimburse all of our present and former employees, except those who joined or signed authorization cards for said Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after that effective date for initiation fees, dues, or other obligations of membership in said Union with interest.

JACKSON ENGINEERING CO.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT enter into, carry out, or maintain arrangements with Jackson Engineering Co. whereby we receive payments from Jackson based upon the percentage of business referred by us to Jackson, or otherwise receive or accept financial or other support and assistance from Jackson.

WE WILL NOT act or claim to act as the collective-bargaining representative of any employees of Jackson Engineering Co. for the purpose of dealing with said Employer concerning wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until we have been certified by the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL NOT perform or give any effect to our contract with Jackson Engineering Co., or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Employer, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until we have been certified by the National Labor Relations Board.

WE WILL, jointly and severally with Jackson Engineering Co., reimburse all present and former employees of Jackson Engineering Co., except those who joined or signed authorization cards for us prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after that effective date for initiation fees, dues, or other obligations of membership in Local 1814, with interest.

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

DECISION

STATEMENT OF CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges and amended charges filed by Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and Local 17, Industrial Union of Marine and Shipbuilding Workers of America, herein called Charging Parties or IUMSWA, the General Counsel of the National Labor Relations Board by the Regional Director for Region 29 issued an order consolidating cases, consolidated complaint and notice of hearing on May 30, 1980, and a consolidated amended complaint on October 7, 1980. The complaint, as amended, alleges that Jackson Engineering Co., herein called Respondent Employer or Jackson, violated Section 8(a)(1), (2), and (3) of the Act and that Local 1814, International Longshoremen's Association, AFL-CIO, herein referred to as Respondent Union or ILA, violated Section 8(b)(1)(A) and (2) of the Act, by *inter alia*, on September 13, 1979,[1] executing and thereafter maintaining and enforcing a collective-bargaining agreement with respect to Jackson's employees, containing a union-security clause, notwithstanding the fact that a real question concerning the representation of said employees had been raised and was pending by virtue of requests for recognition made by IUMSWA. The complaint also alleges that Jackson violated Section 8(a)(1) and (2) and ILA violated Section 8(b)(1)(A) of the Act, by virtue of an arrangement in existence from 1975 to 1979 whereby Jackson made concealed payments to Anthony Scotto and Anthony Anastasio, president and executive vice president of the ILA, respectively, in amounts equal to 10 percent of the additional volume of business resulting from referrals to Jackson by the ILA.

A hearing on the issues encompassed by said complaint was heard before me in Brooklyn and New York, New York, on October 27, 28, and 29, 1980, and on June 3 and 4, 1981.[2]

Briefs which have been received from the General Counsel, Respondent Company, and Respondent Union have been carefully considered, and I might add were all excellently prepared and most helpful in assisting my deliberations herein.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer, a New Jersey corporation, is engaged in the business of performing maritime ship maintenance, building, and repair services and related services, with places of business at 1418 Willow Avenue in Hoboken, New Jersey, herein called the Hoboken facility, at 2945 Richmond Terrace in Staten Island, New York, herein called the Staten Island facility, and various other places of business in New York and New Jersey. Annually, Respondent Employer, in the course of its

[1] Unless otherwise indicated, all dates hereinafter referred to are in 1979.

[2] Although not appearing at the hearing, counsel for the Charging Parties submitted a motion to the Chief Administrative Law Judge, which was referred to me for disposition, requesting withdrawal of the charges herein. Said request had previously been denied by the Regional Director for Region 29, by letter dated October 1, 1980, except for the portion of the charge in Case 29-CB-3966 insofar as it relates to the International Longshoremen's Association, AFL-CIO, which had been named a respondent in the original complaint issued on May 30, 1980. The amended complaint issued on October 7, 1980, pursuant to the Regional Director's approval of the partial withdrawal, removed the International as a respondent herein. I deferred ruling on the motion of Charging Parties to withdraw the remaining portions of the charge pending my hearing the record testimony and consideration of the parties' briefs on this issue.

business operations, performed services in excess of $50,000 for various steamship companies, including United States Lines and Prudential Lines, each of which companies annually derives gross revenues in excess of $50,000 from the transportation of goods and passengers among the several States of the United States and to foreign countries. Respondent admit and I find that Jackson is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that Charging Parties and the ILA are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

A. *Recognition of ILA by Jackson and Arrangement for Payments to ILA Officers by Jackson*

Respondent Employer began its operations in 1948. Prior to 1975 its employees were not represented by any labor organization. Nicholas Seregos, herein called Seregos, became president of Jackson on or about August 1971, when it had sales of less than $500,000 per year.

In mid-1975, Seregos noticed that when he would go around soliciting for business, particularly on U.S. flagships, he would be told that unless he was a union shop his firm could not obtain the work on the piers. Sonny Montella, an acquaintance of Seregos, suggested to him that he contact Anthony Anastasio, an officer of the ILA.[3] Seregos then telephoned Anastasio at the ILA's office and informed Anastasio of his being referred by Montella to Anastasio. Seregos added that he was looking for some business and was interested in unionizing the shop. A meeting was arranged for and held either at Respondent Employer's Hoboken shop or Respondent Union's Brooklyn office. Seregos repeated that he was looking for work and wanted to unionize his shop. Anastasio responded that he wished to meet the employees at the shop and see if they would be willing to sign up. Anastasio then met with Jackson's employees. The record does not disclose what, if anything, Anastasio said to the employees at that time.

Seregos next met with Anastasio sometime prior to July 11, 1975. At this meeting Anastasio offered to obtain some business for Jackson, for a consideration of 10 percent of the proceeds of any business obtained through his efforts. Anastasio made it clear to Seregos that he would not help Seregos get any business unless Jackson became a union shop. Seregos agreed to the arrangement and agreed that his firm would become a union shop.

On or about July 11, 1975, Seregos met again with Anastasio, this time in the ILA's office. At this meeting Anastasio instructed Seregos to write a letter to Prudential Lines, a U.S. flagship company, attention John Marano. Anastasio told Seregos that he could help him obtain business from this firm. Pursuant to Anastasio's instructions Seregos wrote a letter dated July 11, 1975, to Marano of Prudential stating that Jackson is a complete union plant affiliated with the ILA, and that its employees are ILA members.

On September 15, 1975, the ILA obtained authorization cards from Jackson's employees and in late September Jackson, by Seregos, signed a memorandum of understanding with the ILA, apparently agreeing to recognition. Thereafter, pursuant to checkoff authorizations executed by Jackson's employees, it began to checkoff dues and forward them to the ILA.[4]

Sometime in the fall of 1975, Seregos met with Anastasio and Anthony Scotto, president of the ILA, at the ILA's office. Seregos indicated that he was looking for more work. Scotto replied that he could help Seregos obtain the United States Shipping Lines account. The conversation then drifted to how Seregos was going to come up with the 10-percent commission arrangement on this business. Scotto indicated that he was concerned about how Seregos was going to get the money and suggested that he would assist Seregos in setting up a foreign corporation to help him in this regard. Seregos replied that it would not be necessary.

The parties than signed a collective-bargaining agreement effective November 3, 1975, to November 3, 1978. This contract was the industry contract, known as the "blue book," and was signed by Seregos, Anastasio, and Scotto.

At some point in the early fall of 1975, Seregos received a phone call from a Mr. Bauer, assistant to the director at U.S. Lines, notifying Jackson to start work on one of their ships. Jackson began receiving business from Prudential Lines in or about September 1975.

At some time in late 1975, after Jackson began receiving business from Prudential and U.S. Lines, Seregos discussed with Anastasio the method of payment of the 10-percent commission. Anastastio informed Seregos that payments were to be made in cash, and Seregos agreed.

In early 1976 Seregos began his payments to Anastasio, which were made in cash at the ILA's office with no one else present. Pursuant to the arrangement made, Seregos paid Anastasio $15,000 during the course of 1976 covering 10 percent of the business obtained by Jackson from Prudential and U.S. Lines. During the year 1977, Seregos paid to Anastasio $5,000 on June 2, $1,000 on October 6, $5,000 on November 17, and $5,000 on December 19. All of these payments, representing 10 percent of business Jackson obtained from U.S. Lines and Prudential, were also made to Anastasio by Seregos at the ILA office.

In 1978, Jackson lost the Prudential account. Seregos complained to Anastasio about it and asked if there was anything he could do to reinstate the business. The

[3] At that time Anastasio was secretary-treasurer of Local 1277, ILA. In March 1978, Local 1277, as well as other locals of the International, merged into Local 1814, ILA, Respondent Union herein. All parties concede that Respondent Union is the successor to Local 1277. As secretary-treasurer, Anastasio was responsible for the administration of contracts for the ILA in the ship repair industry. He continued exercising that responsibility after the merger when he became executive vice president, the number-two position in the merged organization.

[4] The memorandum of understanding signed by Jackson was not introduced into the record, nor does the record reveal its terms. However, the record tends to suggest, and I so find, that the memorandum of understanding in addition to providing for recognition of ILA also called for Jackson to be bound by the terms of the ILA's industry contract, including dues-checkoff provisions, which was about to expire.

record does not reflect Anastasio's response, but the business was not thereafter restored.

During the year 1978, payments were made in the same fashion, but only covering Jackson's business from U.S. Lines. Seregos gave Anastasio, pursuant to their arrangement, $5,000 on February 28, $5,000 on March 23, $5,000 on April 10, $5,000 on May 15, $3,700 on July 3, and $5,000 on November 15.

During this period of time Seregos met with Anastasio on various union matters, as Anastasio was directly responsible for the administration of the collective-bargaining agreement with Jackson.

In early May 1979, at Anastasio's office, Anastasio asked Seregos if there was any money due "against the work." Seregos responded why now in view of the investigation. Anastasio replied that it was all right.[5]

On May 8, 1979, Seregos paid Anastasio $4,000, again at the ILA's office.

Shortly thereafter, by telephone, Anastasio asked Seregos if he could make a contribution for the purpose of helping Scotto pay his attorney's fees. Seregos replied that it was rather difficult at that time to come up with any money. Anastasio asked him to try, and informed Seregos that they were having an affair at a hotel and were asking others in the industry to contribute to pay Scotto's attorney's fees. Subsequently, Seregos obtained $4,000 in cash and gave it to Anastasio at the ILA office on July 5, 1979.

During the period between 1975 and 1979 Jackson's business as well as its number of employees and ILA members grew substantially.

On November 3, 1978, Jackson and the ILA entered into a renewal of the prior contract, with a number of changes included therein, running from November 3, 1978, to November 2, 1981. This contract was executed by Anastasio and Joseph Collazzo for the ILA and by Seregos on behalf of Jackson.[6]

In January 1979, an indictment was handed down in the Southern District of New York by the grand jury pertaining to the receipt of certain payments by Anastasio and Scotto from certain employers under contract to ILA, not including Jackson.

On July 31, 1979, a superseding indictment was filed adding additional counts of such conduct by Anastasio and Scotto, including payments made by Seregos to Anastasio from 1977-79. Scotto was not indicted for any dealings with Seregos or Jackson.

Shortly after the filing of the superseding indictment, the ILA, upon recommendation of its attorney, immediately removed Anastasio from participation in any dealings or negotiations with Jackson. The ILA also insisted upon and Jackson agreed that Seregos be removed from any dealings or negotiations with the ILA.

Anastasio was permitted by the ILA to remain as its executive vice president and Scotto was allowed to remain as president.

Scotto and Anastasio were tried in Federal court in New York on multiple counts of receiving unlawful labor payments in violation of Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186(b), as well as conspiring to participate in the affairs of the ILA through a pattern of racketeering activity, and for failure to report and pay Federal income taxes on the unlawful amounts obtained from such activities.

After an 8-week trial, both Scotto and Anastasio were convicted in January 1980 of 43 counts under the indictment, and the jury was unable to reach a verdict on 17 other counts included therein.[7] Anastasio was convicted of receiving unlawful payments from Seregos and Jackson for a period from February 28, 1978, to July 5, 1979. Scotto, as noted, was not indicted for nor convicted of the receipt of any payments from Seregos or Jackson. Anastasio was sentenced to 2 years in prison, 5 years' probation, and a $5,000 fine. Scotto was sentenced to 5 years in prison, with 5 years' probation, and $75,000 in fines.

The sentencing occurred in February 1980, and it also included an order by the trial court judge that Anastasio and Scotto forfeit their union offices. The convictions were appealed to the Second Circuit Court of Appeals. On September 2, 1980, a three-judge panel unanimously affirmed the convictions of Anastasio and Scotto. The court in its decision found as follows: "Nicholas Seregos of Jackson Engineering Co., Inc. an ILA-affiliated marine engineering company doing general ship repair, paid Anastasio a 10 percent commission on business obtained for his company with Scotto's and Anastasio's assistance from Prudential Lines, Inc. and United States Lines."

Anastasio and Scotto subsequently petitioned the circuit *en banc* for a rehearing. At some point undisclosed by this record, such request was denied.

Meanwhile, shortly after the conviction, an action was brought by Scotto and Anastasio in the New York State Supreme Court for a declaratory judgment that the term "conviction" under the New York and New Jersey Waterfront Compact means after all appeals are exhausted.[8] The Waterfront Commission moved for judgment in its favor claiming that "conviction" under the statute applies to the date of sentencing. The Supreme Court ruled in favor of the Waterfront Commission in September 1980, and directed that Anastasio and Scotto be removed from office. Upon application, the Appellate Division stayed the order of the Court, pending an expedited appeal from the court's judgment. Said appeal was filed, and in late October 1980 the Appellate Division unanimously affirmed the decision of the Supreme Court. The record does not disclose whether any appeal was filed from this decision to the New York State Court of Appeals.

[5] The "investigation" referred to by Seregos was apparently the criminal investigation which culminated in eventual indictments and convictions of Anastastio and Scotto, discussed more fully *infra*.

[6] This contract as well as the prior contract was negotiated and signed by 11 employers in the industry, including Jackson.

[7] Seregos testified for the prosecution under a grant of immunity. Anastasio did not take the witness stand. Scotto did testify and denied knowledge of any 10-percent commission arrangement with Seregos.

[8] Under the Waterfront Company Act, the Waterfront Commission was established to regulate and control the affairs of longshoremen and labor organizations representing such workers in New York and New Jersey. The Act provides that, upon conviction of a crime, any officer of such a labor organization must be removed.

The record does disclose however that the ILA permitted Anastasio and Scotto to remain as officers of the ILA until the exhaustion of their appeals from these various proceedings. New elections were conducted by the ILA in May 1981, and new individuals were elected to fill the positions previously held by Scotto and Anastasio.

Portions of the testimony given by Seregos in the Federal court trial were stipulated into evidence by the parties and form the basis for my findings set forth above with respect to Seregos' dealings with Anastasio and Scotto. The portions of his testimony included in this record are sketchy and somewhat unclear in certain areas, and my findings set forth herein are based on what I perceive to be a fair reading of such testimony.

The parties are in substantial agreement as to the above facts with the exception of one area. Respondents assert that the record establishes that the unlawful arrangement between Seregos and Anastasio was entered into after the ILA organized Jackson's employees and after the memorandum of understanding and/or contract was executed by the parties in September and November 1975. Although Seregos' testimony is particularly uncertain on this subject, I am persuaded that my findings, set forth above, accurately reflect his testimony and a reasonable conclusion as to the true facts.

Respondent Union points to Seregos' testimony that Anastasio, after having been approached by Seregos about his company becoming a union shop, insisted upon speaking to Jackson's employees to see if they wished to sign up. Such a meeting did occur according to Seregos, and Respondent Union argues that this meeting must have been in September when the authorization and checkoff cards were executed by Jackson employees. Thus, it is argued, since Seregos testified that the arrangement for payments was made after Anastasio met with his employees, that perforce the arrangement was not made until the contract or at least the memorandum of understanding was signed.

I do not agree with his analysis of Seregos' testimony however, and believe that the General Counsel's position that the arrangement was agreed to prior to the execution of the memorandum and contract more accurately reflects Seregos' testimony as well as the record evidence. I note that with respect to the meeting held by Anastasio with Jackson employees after his initial conversation with Seregos that there is no record testimony as to what was said therein, and in fact Seregos indicated that no materials were distributed by Anastasio to his employees at that time. More significantly, Seregos sent a letter to Prudential dated July 11, 1975, which was received by Prudential on July 15,[9] asserting that Jackson was an ILA shop and requesting business. This letter was sent pursuant to the instructions of Anastasio, and was sent 2 months prior to the execution of any contract memorandum. Since Anastasio made it clear to Seregos that he would not refer Jackson any business unless it became an ILA shop, I find that he would not have suggested a letter to Prudential unless he had a commitment from Seregos to become a union shop.

Therefore, I am convinced that Seregos and Anastasio entered into their agreement for the 10-percent commission payment for business referred in July, at least 2 months before any memorandum contract was executed or any authorization cards obtained. At the same time as noted, I find that Seregos orally agreed with Anastasio that he would become an ILA shop.

B. *Jackson's Acquisition of the Staten Island Facility*

Jackson has been and is engaged in the business of major shop repairs, overhauls, and renovations, both at its own and leased locations, as well as at sites where vessels are docked and berthed. Jackson owned and operated a machine shop in Hoboken, New Jersey, and leased facilities at Columbia Street and Pier 12 on the Brooklyn, New York, waterfront, alongside of which were berthed vessels worked upon by its employees. Jackson's employees also would travel to make ship repairs upon vessels tied up at other ports along the coast.

This type of operation that Jackson was engaged in was known in the industry as a pierside operation, as contrasted with drydock work[10] operations, which repairs ships at their own facilities or shipyards.

In both types of ship repair operations, the fluctuation in employee complements is quite substantial with employment frequently sporadic depending upon what jobs are obtained by the employers at any particular time. Respondent in early spring of 1979 employed some 140 employees in the bargaining unit. During the months of June through September 1979, Respondent employed between 40 and 76 employees at various times.

Sometime in the winter of 1978, Jackson began negotiations with Brewer Drydock Co., herein called Brewer, for the purchase of a drydock facility operated by Brewer at Richmond Terrace in Staten Island, New York, right across the bay from Jackson's Brooklyn facilities. Jackson was interested in purchasing this facility, primarily because it would then be able to perform what is known as "bottomside" work, which can only be done with a drydock. Since many jobs in the industry require a company to bid on both "bottomside" and "topside" jobs (called combination jobs), Jackson hoped to expand its business by purchasing a facility which included a drydock. In addition, Jackson's facilities at the Brooklyn pier were rented on a month-to-month basis and were subject to cancellation at any time. The negotitations with Brewer continued on and off throughout the first 4–5 months of 1979. Sometime in April or May, Jackson reached tentative agreement with Brewer for the purchase of the yard, with a few details and fine points to be narrowed down. Sometime in May, Seregos and Milton Horowitz, vice president of Jackson, spoke to Anastasio and Joseph Collazzo of the ILA. They informed the union officials that they were going to buy a

[9] Although Seregos in direct testimony was unsure of when he mailed the letter to Prudential and suggested the possibility that the letter may have been backdated, when confronted on cross-examination by the original letter with a Prudential date stamp reading July 15, he recalled that it was sent in July and that he had orally agreed to recognize the Union prior to sending such letter.

[10] A drydock is like an elevator which lifts a ship out of the water so that work can be performed on portions of the ship which would normally be below the waterline.

shipyard and wanted to negotiate a modification of the parties' existing agreement. One of the ILA officials replied that there was nothing to talk about until Jackson actually purchased the new facility.

n early June the agreement was consummated and the closing held with a purchase price of $2,400,000 for the Staten Island facility of Brewer with Jackson to take over the premises on June 5.

C. *Jackson Rehabilitates the Staten Island Facility and IUMSWA Asserts Its Claims*

Brewer's employees at the Staten Island shipyard had been represented for collective bargaining by IUMSWA since a Board certification on July 25, 1975. The last collective-bargaining agreement between Brewer and IUMSWA ran from September 27, 1978, to August 31, 1981. The contract contains a clause which reads that the agreement shall be binding upon Brewer and its successors and assigns.

Throughout the spring months, Brewer wound down its operations and gradually laid off its work force. By June 5 all of Brewer's employees had been laid off.

On may 29, IUMSWA wrote a letter to Brewer indicating its knowledge of a pending sale, requested the name of the potential buyer, and requested that Brewer notify the buyer that IUMSWA intended to enforce its succesor clause in the contract and asserted its right as exclusive bargaining agent for the work locations as certified by the National Labor Relations Board in accordance with the recognition clause of the contract. The record does not disclose whether this letter was ever forwarded to Jackson, nor whether Brewer ever notified Jackson officials of IUMSWA's claims.

However, during the next several months (between June and September) various officials of IUMSWA met and/or spoke on the phone with various officials of Jackson and asserted IUMSWA's "jurisdictional" bargaining rights at the Staten Island facility and/or rights under the successor and assigns clause of its contract with Brewer. Additionally, the IUMSWA officials requested that Jackson hire the former employees who were now out of work.

At no time did any IUMSWA ever make any claim that it represented any of Jackson's employees.

Indeed, during this period of time between June and early September, Jackson was not engaged in any ship repair activities at the Staten Island yard. During these months, Jackson was engaged in rehabilitating the facility to make it ready to accommodate Jackson's ship repair operations. This consisted of repairing, changing, and renovating the facility, plus constructing housing and meal facilities for naval personnel, to be used while naval vessels were being refitted.

Vincent Klusmyer, Jackson's general manager at the Staten Island facility, was in charge of the rehabilitation and to that end he employed a number of outside subcontractors to perform this work. In addition, Waterfront Marine, an affiliate of Jackson, controlled by Seregos, employed 10–12 individuals to maintain and guard the shipyard. These individuals were all formerly employed by Brewer. All but one of these individuals had been previously employed by Brewer in supervisory or nonunit positions, such as dock master, assistant dock master, maintenance foreman, and estimator. One employee, J. Boschi, who had been an electrician at Brewer, was performing electrical maintenance tasks during the summer months while the yard was being rehabilitated.

During this period of time there was no ship repair work being performed at the Staten Island facility. Jackson continued its business at the Brooklyn piers as well as its Hoboken machine shop with an employee complement fluctuating between 40 and 76.

D. *Modification of the Existing Jackson ILA Contract*

In late June or early July, and through the summer months, ILA and Jackson representatives met to discuss modification of the existing contract.[11]

Jackson requested that its existing contract be modified in view of its purchase of the Staten Island facility. Jackson argued that the ability to bid on combination jobs would result in more regularity of employment of work for its employees, thereby making up for any loss in contractual benefits. In addition, rates for shipyard firms are traditionally lower in the industry than for pierside operations, and Jackson, to be competitive with its competition, needed lower labor costs. Moreover, the costs of maintaining a shipyard are considerably higher than of a pierside operation. The ILA agreed to discuss such a modification but only if it was convinced that more regularity of employment would ensue.

To this end the parties reviewed and compared the contracts of various shipyards, including the contract between IUMSWA and Brewer. The contracts of the shipyard firms were lower with respect to wages and benefits than the existing contract between ILA and Jackson.

After a number of bargaining sessions, with numerous proposals being presented by both sides, an agreement was reached, on or about September 5. The agreement was then prepared by ILA representatives and executed by the parties on September 13, retroactive to September 5.

The agreement modified the recognition clause to include the Staten Island facility.[12] Recognizing the fact that some employees of Jackson would still be performing some work outside the Staten Island facility at various piers, even with the acquisition of the new yard, the parties ageed that the 25 most senior employees who would be most likely to perform such work[13] would receive no reduction in their wages or benefits.

With respect to the remaining employees, the parties agreed that in view of the expected increase in regularity of employment for them they would receive slight reductions in wages, pension, and hospitalization contribu-

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[11] Present for Jackson were Klusmyer, Horowitz, and its attorney, Martin Seham. For the ILA its attorneys Howard Schulman and Robert Bogucki, business agent Collazzo, and various employee committee members attended these bargaining sessions.

[12] The prior agreement makes no specific mention of any facilities of the employers involved. It merely provides for recognition of various classifications of employees "employed by the employer."

[13] These more experienced employees were capable of working without supervision, so were therefore more apt to be assigned to outside piers where there were no Jackson supervisors present.

tions. Other benefits such as holidays, sick days, and jury duty were not modified for any employees.[14]

During the course of these sessions, Jackson informed the ILA that it intended to give preference in employment at the Staten Island facility to employees currently employed at Hoboken and at the Brooklyn piers as well as to employees on layoff status from these facilities.[15]

There was no discussion of the jurisdictional and successorship clause asserted by IUMSWA during any of these sessions. As noted the IUMSWA contract with Brewer was referred to constantly during these meetings. There is no question that Jackson never had any doubt that it would recognize the ILA as the representative of its employees at the Staten Island facility, as it believed that it was obligated to do.[16]

E. *Jackson Begins Ship Repair Operations at the Staten Island Facility*

On September 5, 1979, Jackson began ship repair operations at the Staten Island yard. In its first week of such operations, Jackson employed 51 bargaining unit employees. Of these employees, 48 were transferred over from its Brooklyn or Hoboken facilities.[17]

Jackson also employed two individuals who were formerly employed by Brewer,[18] and one individual who was neither a former Brewer employee nor a Jackson transferee.

Jackson also employed 10–11 former Brewer supervisors and nonunit personnel into various supervisory positions at the Staten Island yard.

During its next week of operation, the payroll period ending September 16, 1979, Jackson employed 55 employees, 46 preexisting Jackson employees, 2 former Brewer employees,[19] and 7 employees from neither group.

On or about September 20, Jackson acquired a new contract to repair a vessel called the *Waterford*. This job required a deadline to be met, and necessitated the hiring of a substantial number of additional employees. In this connection, Jackson, after exhausting its list of laid-off Jackson employees, hired most of these additional employees from a group of some 500 employment applications and resumes that it had on file. These applications and resumes resulted from newspaper advertisements Jackson had placed in various newspapers, as well as from word of mouth sources. Included in these applications and resumes in Jackson's files at that time were 100 applications from former Brewer bargaining unit employees.

By October 25, 1979, by which time Jackson was utilizing drydocks at the Staten Island facility, it employed 151 bargaining unit employees. Included among these employees were 49 employees who had been in the Jackson ILA bargaining unit, 23 former Brewer employees, who had been included in the IUMSWA unit, and 79 employees from neither category of employees.

Prior to its acquisition of the shipyard, the number of "regular" or "steady"[20] employees in the Jackson bargaining unit fluctuated between 50 and 70 employees. As of June 1981, the number of such regular employees fluctuated from 100 to 135.[21]

Of the four contractual job classifications included in the parties' modified contract, employees were hired by Jackson in each classification when the yard opened on September 5.

Prior to its acquisition of the Staten Island yard, Jackson employed employees who performed work requiring 14 of the 16 trade skills that were eventually to be required when it became fully operational. The two new skills were dockhand and crane operator.[22]

On the payroll weeks ending September 9 and 16, Jackson employed one crane operator and no dockhands. On the week ending October 25, Jackson employed three crane operators and three dockhands.[23]

With the exception of the dockhand and crane operator functions, the work performed by Jackson's employees before and after the acquisition of the shipyard was essentially identical. The only meaningful difference between the two operations is the use of the drydock, which as noted requires use of dockhands to lift the vessel out of the water, and enables Jackson to now perform bottomside work. However, the actual ship repair work performed by Jackson employees on bottomside work is no different from that performed on topside work. The skills required are the same, and no additional training is required to enable an employee who is able to perform topside work to perform bottomside work. Jackson's employees work interchangeably on "top" and "bottom" work, there being no such thing as a topside or bottomside crew. Shipyards (Brewer prior to September

[14] The modification also changed the duration of the prior agreement, as the agreement as modified runs from September 5, 1979, to September 4, 1982, with reopening provided for 30–60 days prior to September 5, 1980, and September 5, 1981. The modified contract also contained a union-security clause as did the prior agreement.

[15] In this connection, Jackson maintained a file of 300–400 W-4 forms, consisting of names and addresses of its employees who have worked for Jackson in past years, which it uses whenever it needs to hire additional employees.

[16] When asked if he informed the ILA that IUMSWA had asserted any claims with respect to the facility, Horowitz responded, "No sir. I felt we had a union already. We had a union."

[17] As noted, Jackson closed down its operations at the Brooklyn piers, where it had previously rented facilities from the Port Authority. It continued to operate its Hoboken machine shop while continuing to operate the Staten Island yard. The record is not clear as to how many of the Hoboken employees were transferred over to Staten Isalnd, although it does appear that the bulk of the employees who were sent to Staten Island were formerly employed at the Brooklyn piers.

[18] One of these individuals was J. Boschi, an electrician, who had been employed by Waterfront Marine during the rehabilitation period from June through September. He performed essentially the same work (electrical maintenance functions) during the rehabilitation period as he did after ship repair operations began on September 5. The other former Brewer employee, E. Gamboa, was employed as a crane operator.

[19] Again Boschi and Gamboa.

[20] A "regular" or "steady" employee is defined as an employee who works 4–5 days a week for two-thirds of a year.

[21] The above findings are derived from the credited testimony of Michael Porta, Jr., a Local 1814 delegate, who testified as to these figures based upon his observations in servicing the shop, consisting of visits on the average of twice a week from the time the shipyard opened until the date of his testimony, herein on June 4, 1981.

[22] Dockhands were not needed at Jackson's prior operations, since it did not operate a drydock. Crane operators had been utilized previously by Jackson, but were supplied by the lessor of the crane that Jackson had rented.

[23] Two of the three dockhands hired by Jackson were former Brewer employees from the IUMSWA bargaining unit.

and Jackson after September) and pierside operations (Jackson prior to September) perform the same work and hire from the same source of workers, and shipyard or pierside experience is equally significant in terms of hiring qualifications for hire in either type of operation.

As noted above, the primary reason motivating Jackson to purchase the Staten Island yard from Brewer was the fact that the yard included a drydock which enabled Jackson to bid on combination (top and bottom) jobs. Since its commencement of operations at the shipyard, about 30 percent of Jackson's business includes such combination bids. Of such jobs acquired as a result of combination bids, 30 percent of such work includes bottomside repairs. Thus, bottomside work comprises approximately 9 percent of the work being performed by Jackson employees, since its acquisition of the shipyard and its use of the drydock.

F. *IUMSWA Files ULP and Article XX Charges*

On September 28, 1979, IUMSWA filed unfair labor practice charges against Jackson and the ILA alleging in addition to the 8(a)(2) and (b)(1), (A), and (2) *Midwest Piping* allegations contained in the instant complaint, that Jackson violated Section 8(a)(5) of the Act by refusing to recognize IUMSWA as the successor to Brewer's bargaining obligation, and Section 8(a) (3) of the Act by discriminatorily refusing to hire former Brewer employees because of their IUMSWA membership, and that ILA violated Section 8(b)(1),(A), and (2) by causing Jackson to refuse to hire such employees.

On December 14, the Regional Director for Region 29 dismissed the 8(a)(5) portions of the charges in a letter reading as follows:

> Gentlemen:
>
> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> The investigation did not establish that Jackson Engineering Co., hereinafter referred to as Jackson, violated Section 8(a)(5) of the Act by refusing to recognize and bargain with Industrial Union of Marine and Shipbuilding Workers of America, Local 17, hereinafter referred to as Local 17, as the collective-bargaining agent of its employees employed at the former Brewer Dry Dock Company, hereinafter referred to as Brewer, facility at 2945 Richmond Terrace, Staten Island. Rather the evidence disclosed that in June 1979, Jackson purchased that facility from Brewer to replace and supplant Jackson's former ship repair facility located in Brooklyn, New York, and that in September 1979, after performing certain maintenance and make-ready work on the facility, Jackson closed its Brooklyn facility, relocating to the former Brewer yard in Staten Island, and taking with it its work force from the Brooklyn facility.
>
> Prior to transferring title to the Staten Island facility to Jackson, Brewer laid off or terminated all of its production and maintenance employees, such employees having been represented for collective bargaining purposes by Local 17.
>
> While the investigation disclosed that Jackson continues to use the facility for the same purpose which Brewer operated it; the repair and maintenance of ships and other vessels; that Jackson (as did Brewer) classifies all of its production and maintenance employees in a single unit; that there was not a significant hiatus in the operation of the Richmond Terrace Shipyard; and that Jackson has hired some of the employees formerly employed by Brewer since it commenced operations at the shipyard, nevertheless, it does not appear that Jackson has purchased any of the goodwill of Brewer or assumed any of its liabilities or other assets, or that a majority of Jackson's present complement of employees at the Richmond Terrace facility are former Brewer employees.
>
> In these circumstances, the evidence is insufficient to establish that Jackson is a successor to Brewer and was therefore under an obligation to continue to recognize and bargain with you as the collective bargaining representative of the employees employed at the Richmond Terrace shipyard. I am therefore refusing to issue a complaint on the allegation of your charge which alleges that Jackson violated Section 8(a)(5) of the Act. Other allegations of your charge are being processed further.

The Regional Director also refused to issue complaint with respect to the 8(a)(3) and 8(b)(1),(A), and (2) allegations pertaining to Jackson's refusal to hire employees because of their IUMSWA membership.[24]

IUMSWA appealed the Regional Director's partial refusal to issue complaint with respect to the 8(a)(5) successorship allegations. On February 11, 1980, the Acting Director of Appeals upheld the Regional Director's refusal to issue complaint on these allegations, agreeing with the Regional Director that Jackson was not a successor to Brewer's collective-bargaining obligation to IUMSWA.

On October 5, 1979, IUMSWA filed charges under article XX of the AFL-CIO constitution complaining that ILA has violated sections 2 and 3 of such article by allegedly failing to respect an established collective-bargaining relationship and work relationship maintained by IUMSWA at the Richmond Terrace shipyard.

On October 12, 1979, ILA filed similar charges against IUMSWA, alleging additionally that IUMSWA violated section 20 of article 20 by resorting to the NLRB to determine the dispute. A hearing was subsequently held on February 6, 1980, on the matter before Impartial Umpire D. Q. Mills.[25]

At this hearing representatives of IUMSWA and ILA, as well as their respective attorneys, participated, called witnesses, and were given the opportunity to and did

[24] The record does not reflect whether these portions of the charges were withdrawn or dismissed.

[25] A hearing has been held on November 8, 1979, before Umpire Kleeb. However, Kleeb passed away prior to rendering his decision and a new hearing was conducted.

present arguments and positions. On February 20, 1980, Impartial Umpire Mills issued his decision, referred to as "Determination." He found that ILA had not violated either section 2 or 3 of article XX, since the standards under article XX for the survival of IUMSWA's collective-bargaining agreement relationship have not been met, and that ILA had not by exercise of collusion or economic pressure—sought to obtain work for its members as to which another affiliate has an established work relationship.

The Umpire also found that IUMSWA had violated sections 2 and 20 of article XX by interfering with ILA's established collective-bargaining relationship as to the employees in dispute, in its efforts to represent these employees and resorting to the NLRB to determine the dispute.

IUMSWA subsequently filed an appeal from Umpire Mills' determination, which was heard before a subcommittee of the AFL-CIO executive council. By letter dated May 21, 1980, from Lane Kirkland, president of the AFL-CIO, the appeal was disallowed and the determination of the Impartial Umpire was ordered to go into full force and effect.

On June 3, 1980, Michael Brodie, Esq., attorney for Charging Party, wrote a letter to the Regional Director for Region 29, referring to the above-described determination and disallowance of IUMSWA's appeal. The letter then stated, "pursuant to the enclosed documents and as a result of their issuance, my client hereby requests that the charges and amended charges in the above proceedings be withdrawn."[26]

On October 1, 1980, Regional Director Kaynard sent a letter to Brodie, denying his request to withdraw, except as noted with respect to the charges against the International of the ILA. Regional Director Kaynard's letter is set forth below:

> Dear Mr. Brodie:
>
> Your letter requesting withdrawal of the unfair labor practice charges in the above-captioned cases has been carefully considered. For the reasons stated below, you are hereby advised that your request to withdraw the charge in Case No. 29-CA-7498 is denied, and that your request to withdraw the charge in Case No. 29-CB-3966 is approved only insofar as it relates to the International Longshoremen's Association, AFL-CIO, but is denied insofar as it relates to Local 1814, International Longshoremen's Association, AFL-CIO.
>
> As you know, the investigation of these charges disclosed evidence of serious violations of the National Labor Relations Act by Jackson Engineering Co. and by Local 1814, AFL-CIO, including concealed payments made by Jackson to Anthony Scotto and Anthony Anastasio, the president and executive vice president of Local 1814, ILA, AFL-CIO, respectively, commencing in 1975 pursuant to an unlawful arrangement between Jackson and Local 1814, all of which are alleged in the Consolidated Complaint which I issued in these cases on May 30, 1980. Although you advise that an Impartial Umpire has determined that your clients, the charging parties in these cases, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and Local 17, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO violated Article XX of the AFL-CIO Constitution by resorting to the Board's processes to resolve your dispute with Jackson and Local 1814, ILA, and that the Executive Council of the AFL-CIO has upheld this ruling by the Impartial Umpire and has directed you to request withdrawal of these charges, I have nevertheless concluded that there exists an overriding of public interests to be served by the continued processing of these cases insofar as they relate to the unfair labor practices which were engaged in by Jackson Engineering Co. and Local 1814, ILA, AFL-CIO, as alleged in the Consolidated Complaint issued on May 30, 1980. I do not believe, therefore, that it would effectuate the policies of the National Labor Relations Act to approve your request to withdraw the charges against these Respondents in these cases. Accordingly, that request is hereby denied.
>
> On the other hand, upon reconsideration of the allegations of the Consolidated Complaint insofar as they relate to International Longshoremen's Association, AFL-CIO, I have concluded that the investigation has disclosed no evidence that this Respondent has engaged in any of the unlawful conduct alleged in the Consolidated Complaint issued on May 30, 1980. Your request to withdraw the charge in Case No. 29-CB-3966 insofar as it related to the International Longshoremen's Association, AFL-CIO is therefore hereby approved.

As noted above, IUMSWA's attorney renewed to the Chief Administrative Law Judge its request to withdraw, which was in turn referred to me for disposition.

As a result of the article XX proceeding set forth above, Local 17 of IUMSWA was dissolved and became defunct.[27]

III. ANALYSIS

A. *The Article XX Proceedings and IUMSWA's Request To Withdraw*

Respondents contend that the instant complaint should be dismissed based on the fact that the article XX proceeding, wherein IUMSWA fully participated, resolved any possible question concerning representation of Jackson's employees at the Staten Island yard. Moreover, they urge that IUMSWA's withdrawal request, based on said article XX proceeding, should be approved, thereby also mandating the dismissal of the instant complaint.

The General Counsel argues that the Board enforces public and not private rights, and that particular questions concerning representation rights should be deferred

[26] The above proceedings refer to the instant charge and complaint.

[27] Brewer was the only employer with whom Local 17 of IUMSWA had a collective-bargaining agreement or relationship.

to other tribunals. Thus, it is contended that no effect should be given to the article XX proceeding insofar as it attempts to resolve the alleged question concerning representation herein, or as a predicate for the approval of IUMSWA's request to withdraw the charges and consequent dismissal of the complaint herein.

The instant complaint contains essentially two separate and distinct allegations, which in my judgment require separate consideration for the purposes of assessing these contentions.

Dealing first with the allegations of concealed payments, the complaint alleges that on various dates between 1975 and 1979, Jackson, by Seregos, made such payments to Anastasio and Scotto as agents of ILA, in violation of Sections 8(a)(1) and (2) and 8(b)(1)(A) of the Act. It is clear that these allegations were not brought up, considered, or dealt with during the article XX proceeding. Thus, no basis exists for deferring or dismissing this aspect of the complaint based on the article XX decision.

However, IUMSWA has, as a result of such proceeding, requested withdrawal of the charges it has filed, said charges of course forming the predicate for the instant complaint. Although the Regional Director has denied the Charging Parties' request to withdraw, an administrative law judge has the discretionary authority to approve such requests made before him, even where the General Counsel objects.[28] Thus, it becomes necessary for me to determine whether the public interest and the purposes and policies of the Act would be served or vindicated by approval of the withdrawal request herein.

Respondents argue that, since Anastasio and Scotto have both been convicted criminally, sentenced, and removed from union office, no useful purpose would be served by continuing this phase of the litigation, and that a cease-and-desist order would be duplicative, superfluous, and wasteful of agency sources. They also point out that Anastasio, Scotto, and Seregos were immediately removed from any dealings and negotiations between Jackson and the ILA immediately upon the superseding indictments being issued.

The Regional Director, in his letter denying the request to withdraw the charges, characterized the concealed payments herein as "serious" violations of the Act and concluded that there "exists an overriding public interest to be served" by the continued processing of these charges. I agree. I do not subscribe to Respondents' contentions that the criminal convictions of Anastasio and Scotto, and their subsequent removal from union office,[29] obviate the need for any further proceedings herein.

The criminal proceedings did not resolve nor did it purport to decide the issue under consideration herein, i.e., whether the ILA and/or Jackson are responsible for the conduct of its officers of making and receiving concealed payments pursuant to an unlawful arrangement over a 4- to 5-year period. It seems to me that the employees of Jackson and the membership of the ILA are entitled to a clear and unequivocal statement by the posting of a notice, signed by its representatives, that Jackson and the ILA do not, and will not, countenance such behavior on the part of its officers and agents.[30]

Therefore, I conclude that the public interest and the purposes of the Act will not be served by approval of the withdrawal request with respect to the concealed payments allegations in the complaint herein, and I shall deny IUMSWA's request to do so.

The other portion of the complaint herein, the *Midwest Piping*[31] allegations, dealing with Jackson's signing a modification of its contract with the ILA extending coverage of its employees at the Staten Island yard, presents a more troublesome issue insofar as it relates to the withdrawal request.[32]

The *Midwest Piping* allegations herein are based on the alleged existence of a real question concerning representation, by virtue of certain claims made by IUMSWA prior to the execution of the September 1979 modification contract by ILA and Jackson covering the latter's employees at the Staten Island yard. As pointed out, quite persuasively by Respondents, IUMSWA has now sought to withdraw its charges herein, thereby eliminating any current question concerning representation, real or otherwise, for these employees. Even more significantly, Local 17 of IUMSWA has been dissolved and is now defunct. Thus, any election that might be ordered as a result of an 8(a)(2) finding herein would not include IUMSWA and employees would not be able to choose between IUMSWA or ILA as their representative. Therefore it is questionable whether this phase of the litigation should be persuaded further, particularly in an area such as *Midwest Piping* where the Board had been rebuffed consistently in its approach by numerous circuit court of appeals.[33]

Although the Second Circuit Court of Appeals has approved the Board's *Midwest Piping* approach,[34] it has re-

[28] *Alberici-Fruin-Colnon*, 226 NLRB 1315, 1316 (1976); *Local 638, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Roland Tompkins, Inc.)*, 158 NLRB 1747, 1750 (1966).

[29] I note in this connection that the record does not establish whether Seregos has been removed as an officer of Jackson.

[30] In this connection, the action of the ILA and Jackson, of removing Seregos, Anastasio, and Scotto from any dealings with each other with respect to matters involving collective bargaining, falls far short of giving such assurances to its employees and/or its members. I note that the ILA continued to permit Anastasio and Scotto to remain as officers of the Union, even after they were convicted of accepting such payments, as well as other criminal conduct, notwithstanding orders of two lower courts to remove them, until finally all appeals were exhausted.

[31] *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060 (1945).

[32] The contention that the art. XX decision itself must be deferred to, since IUMSWA fully participated therein, is clearly without merit. Although the issue of the representation of Jackson's employees at the Staten Island yard was considered and decided, NLRB standards, policies, considerations, and precedents, in neither the unfair labor practice nor the representation case area, were evaluted nor considered in the art. XX proceeding. The Board has exclusive jurisdiction to resolve questions of representation, and will not defer to private resolutions such as an art. XX proceeding of such questions. *Weather Vane Outwear Corporation, Inc.*, 233 NRLB 414 (1977); *Anheuser-Busch, Inc.*, 246 NLRB 29 (1979).

[33] *Playskool, Inc., et al.* v. *N.L.R.B.*, 477 F.2d 66 (7th Cir. 1973); N.L.R.B. v. *Peter Paul, Inc.*, 467 F.2d 700 (9th Cir. 1972); *Modine Mfg. Co.* v. *N.L.R.B.*, 453 F.2d 292 (8th Cir. 1971); *American Bread Company* v. *N.L.R.B.*, 411 F.2d 147 (6th Cir. 1969); *N.L.R.B.* v. *Air Master Corporation, et al.*, 339 F.2d 553 (3d Cir. 1964).

[34] *Hudson Berlind Corp.*, 494 F.2d 1200 (2d Cir. 1974); *N.L.R.B.* v. *Midtown Service Co., Inc., et al.*, 425 F.2d 665 (2d Cir. 1970).

cently expressed some reservations on whether it intends to continue to do so. Thus, in *American Can Company* v. *N.L.R.B.*, 535 F.2d 180, 186 (2d Cir. 1976), the court, while enforcing the Board's order,[35] took pains to point out that it was not endorsing the Board's approach in these cases. The court quoted the 7th Circuit's summary in *Playskool, supra*, of the difference between the approach of the Board and the courts on this issue as follows:

> The Board looks first to the support held by the minority union and finds a "question concerning representation" if the claim of that union is "not clearly unsupportable"; the courts look first to the support held by the majority union and find that no "question concerning representation" exists if that union has the validly-obtained support of an employee majority and the rival union is thus shown to be "no genuine contender." 477 F.2d at 70 n.3.

After noting that courts have rejected the Board's view that *Midwest Piping* applies even where one union has shown that it represents a majority in the contested unit, the court found that this was not the case in *American Can*, where there was no showing of majority support for the recognized unit among the disputed employees. Thus, the court found that the circuit court cases cited above, which rejected the Board approach, were not controlling. However, in *American Can* at 186, fn. 7, the Second Circuit opinion states:

> We of course, express no view as to the correctness of those cases, nor do we imply any approval of the Board's practice of adhering to its position after it has been rejected by several courts of appeals.

Thus, the Second Circuit's current view of *Midwest Piping* is certainly open to question, and since this case clearly falls into the area of cases where courts have rejected the Board approach,[36] this is but another reason why serious consideration should be given to the approval of the withdrawal request with respect to this portion of the complaint.

Moreover, I note that the Regional Director's letter denying IUMSWA's request to withdraw its charges makes no specific reference to the *Midwest Piping* allegations. It is true as pointed out by the General Counsel that the letter states that the charges disclosed evidence of serious violations including the concealed payments, and that therefore it could be argued that the *Midwest Piping* allegations are encompassed by such a description. However, in the absence of any discussion of the issue, I cannot determine whether the Regional Director considered the *Midwest Piping* violations to be "serious" violations, in and of themselves, sufficient to justify denial of the withdrawal request, even absent the presence of any other alleged violations. It is more likely, in view of the emphasis placed in the letter on the concealed payments issue, that the Regional Director felt that, since the *Midwest Piping* violations were allegedly committed by the same parties who were involved in the concealed payments, the entire matter should be litigated fully.

Counsel for the General Counsel seems to suggest that the *Midwest Piping* allegations are sufficiently serious violations in and of themselves to warrant denial of the withdrawal request, but also argues that the concealed payments establish a specific proclivity by Jackson to deal with the ILA, which sheds light on the *Midwest Piping* allegations as well.

Although the arguments in favor of granting the withdrawal request as to the *Midwest Piping* aspects of this case are quite compelling, after careful consideration and balancing of all the relevant factors and positions, I am constrained to conclude that the withdrawal request should not be granted as to this portion of the complaint either, and that the purposes and policies of the Act and the public interest would best be served by a determination on the merits of the entire complaint herein.

Initially it must be noted that the Board in representation cases, although having a policy of accommodating efforts being made to resolve disputes between unions under no-raid agreements,[37] has frequently found it necessary to refuse to approve withdrawal requests filed pursuant to such no-raid proceedings. In *Cadmium & Nickel Plating, Division of Great Lakes Industries, Inc.*,[38] the Board refused to permit withdrawal of a petition, which was requested due to an order from the AFL–CIO based on their no-raid pact provisions. The Board characterized this withdrawal request as not being voluntary, but due to the compulsion exerted under and arising from the no-raid pact. Thus, the Board found that to allow withdrawal of the petition under these circumstances,

> . . . would be to permit a private resolution of the question concerning representation in a manner contrary to the policies of the Act and would impinge upon the Board's exclusive jurisdiction and authority to resolve such questions of representation. [*Id.* at 354.]

As noted above, the Board has consistently adhered to this view. See *Anheuser-Busch, supra; Weather Vane, supra.*

It would seem to follow that permitting a withdrawal compelled by an article XX proceeding, in an unfair labor practice case as here, would be even more contrary to the policies of the Act, since if the allegations are sustained by the evidence, Respondents will have been found to have unilaterally abrogated to themselves the Board's function of resolving a question concerning representation.

Moreover, while IUMSWA's defunctness renders the outcome of any election that might be eventually ordered herein probably a foregone conclusion, the remedy ordered however would still be meaningful. The complaint alleges 8(a)(3) and 8(b)(2) violations based on the

[35] 218 NLRB 102 (1975).

[36] It is undisputed that at the time the September 1979 modification contract was signed, the ILA represented an overwhelming majority of employees employed at the Staten Island plant.

[37] *Mack Trucks, Inc.*, 209 NLRB 1003 (1974); N.L.R.B. Field Manual, sec. 11050.

[38] 124 NLRB 353 (1959).

existence of a union-security clause in the contract. Thus, assuming a violation were to be found herein, a substantial number of employees would be entitled to a refund of dues they paid pursuant to this clause. Accordingly, approval of the withdrawal of the charge insofar as its relates to the *Midwest Piping* allegations could result in deprivation of moneys due to a large number of employees for a substantial period of time.[39]

Finally, there is the question of the possible connection between the unlawful payments and the *Midwest Piping* allegations.

I note that, although the complaint alleges no connection between these events, it is of course obvious that the same parties who entered into the concealed payments arrangment entered into the contract which is alleged to be unlawful.[40]

Moreover, the complaint alleges that the final payment made by Jackson to the ILA was made in July 1975, at the same time that the parties were negotiating the contract alleged herein to have been unlawfully executed. These circumstances suggest at least an arguable connection between the two aspects of this litigation, and is but another reason for me to conclude, which I do, that the public interest and the purposes and policies of the Act would best be served by a full determination on the merits of all allegations in the instant complaint. Therefore I shall deny in full the request of IUMSWA to withdraw its charges and I shall proceed to dispose of the complaint on the merits.

B. *The Concealed Payments*

The evidence is undisputed that, at various times between early 1976 and mid-1979, Seregos made concealed payments in cash to Anastasio of amounts of money comprising 10 percent of the business referred to Jackson by Anastasio and/or Scotto.[41]

Respondent Employer raises Section 10(b) of the Act as an affirmative defense to this allegation of the complaint, claiming that any payments made prior to 6 months before the filing of the charges herein are time barred. However, it is well settled that the period of limitations prescribed by Section 10(b) does not begin to run on alleged unfair labor practices, until the person adversely affected is put on notice of the act constituting it.[42]

The payments herein were clearly concealed and came to light only through Seregos' testimony at the criminal proceedings which occurred within the 10(b) period. Thus, the concealment of the conduct of these unlawful payments prevented the timely filing of a charge, and the 10(b) period is therefore tolled, until the conduct was discovered by virtue of the criminal action. Thus, Section 10(b) does not preclude the finding of any violations herein.

With respect to the merits of this allegation, the parties do not disagree that such payments, if made by Jackson to "a labor organization," constitute violations of Sections 8(a)(1) and (2), and 8(b)(1)(A) of the Act, even though such conduct may also involve criminal violations under other sections of other Federal laws, *Sweater Bee By Banff, Ltd.*, 197 NLRB 805 (1972).

The key issue, that is in substantial dispute herein, is the question of whether the payments were made to a "labor organization," or put another way, whether Anastasio and Scotto were agents of the ILA with respect to this conduct. The starting point for discussion of the liability of unions for conduct of its officials is the much cited Board case of *International Longshoremen's and Warehousemen's Union C.I.O (Sunset Line & Twine Company)*, 79 NLRB 1487 (1948). All parties have cited various portions of this opinion to support their respective positions as to the responsibility of the ILA for the receipt of these payments by its officials from Jackson.

The Board observes therein that the Act does not regulate individuals acting in a private capacity, but that only employees or labor organizations or their agents can commit unfair labor practices. Therefore, the question is whether the conduct of the individuals can properly be imputed to the Union, for,

> . . . unless the record justifies that imputation, there was no violation of the Act in this case. In determining whether or not the evidence does afford a basis for holding the Unions responsible for the episodes in question, the Board has a clear statutory mandate to apply the "ordinary law of agency." [*Id.* at 150.]

The Board then set forth those fundamental rules of the law of agency which are to control decisions on the issue of union responsibility for the conduct of its officials:

> 1. The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. In this case, for example, it was incumbent upon the General Counsel to prove,

[39] Respondent Union argues, with respect to this issue, that this would not be a hardship to employees and in fact payment of their dues would be a windfall to the employees, since they were obtaining adequate representation from ILA for this period of time. They also point out that the ILA contract contained higher wages and benefits than the Brewer's contract with IUMSWA. However, in any 8(a)(2) case where the employees have obtained representation and benefits from the unlawful contract, the Board routinely grants a refund of dues to those employees who were not previously members of the assisted union, on the grounds that their membership was automatically deemed to be coerced by virtue of the union-security clause in the contract.

[40] The fact that different individuals of Jackson or ILA were involved in the two aspects of the case is not determinative, although the issue of agency is of course crucial to a determination of the merits. However, for purposes of assessing the withdrawal request, the complaint allegations must be deemed proved, and therefore an assumption that the same parties were involved in both aspects of the charge is appropriate.

[41] These sums, totaling $63,750, represented business referred to Jackson from U.S. Lines and Prudential Lines. In addition, the record revealed that Seregos in July 1979 gave $4,000 to Anastasio for the purpose of assisting Scotto's defense fund. The record does not establish whether this payment constituted a percentage of any business referred to Jackson. In fact, the record appears to indicate the contrary, since Anastasio was apparently asking at that time a number of employers in the industry to contribute to Scotto's defense fund.

[42] *Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders*, 227 NLRB 765 (1977); *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners, AFL-CIO (Skippy Enterprises, Inc.)*, 211 NLRB 227 (1974).

not only that the acts of restraint and coercion alleged in the complaint were committed, but also that those acts were committed by agents of the Respondent Unions, acting in their representative capacity. The Respondents' failure to introduce evidence *negating* the imputations in the complaint did not relieve the General Counsel of that burden.

2. Agency is a *contractual relationship*, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.

3. A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.[44]

[44] Restatement Agency, Secs. 219, 228–237. This is the effect of Section 2(13) of the Act, which provides,

> In determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the *specific acts performed* were actually authorized or subsequently ratified shall not be controlling. [Emphasis supplied. *Id.* at 1508, 1509.]

The Board, in *Sunset Line and Twine, supra*, in finding acts of violence related to picketing to be attributable to the union, found that the absence of proof of specific authorization or ratification to be immaterial, so long as there was evidence that the agent was on that occasion acting within the scope of his general authority to direct the strike and picketing. The union was responsible for wrongful acts which were performed in furtherance of the same purposes and were of the same general character as or incidental to the picketing.

The instant case presents a rather unique and unprecedented application of the principles of agency set forth in *Sunset Line and Twine, supra*. There is no question that Anastasio's authority extended to organizing employees, securing recognition, and executing and administering collective-bargaining agreements with employers. The record is devoid of any evidence that he was authorized to obtain additional business for employers and to enter into arrangements for payments from said employers for such referrals. Respondents argue that no interest of the ILA is served or furthered by the payments herein, and that the actions of Anastasio were "simply a personal adventure or frolic," and not attributable to the Union.[43]

[43] *Lyon* v. *Carey*, 533 F.2d 649 (D.C. Cir. 1976); *International Distributing Corporation* v. *American District Telegraph Company*, 569 F.2d 136 (D.C. Cir. 1977); *Brennen State Bank* v. *Hartford Accident & Indemnity Co.*, 427 F.2d 425 (7th Cir. 1970).

As pointed out by Respondents, there is no evidence that the ILA received any of the moneys paid by Jackson to Anastasio, nor any evidence that the ILA received any other tangible benefit from such payments.

However, the record does establish that the arrangement between Anastasio and Seregos for these payments and the job referrals is not so easily divorced from Anastasio's position and responsibilities with the ILA. The unlawful arrangement was intimately connected to and arose out of Jackson's decision to recognize and sign a collective-bargaining agreement with the ILA for the representation of Jackson's employees.[44]

During the period of years wherein business was referred to Jackson by Anastasio and Scotto, the number of unit employees as well as Jackson's gross revenues increased substantially. The record does not establish that this increase in employees and business was solely or even primarily attributable to the above-described referrals of business, but there is no question that these referrals were quite significant in enhancing Jackson's success. Such a turn of events cannot help but to have furthered the interests of the ILA. It is not clear from the record whether the firms who performed the work for U.S. Lines and Prudential previous to Jackson being retained were ILA-represented companies. Thus, it is not certain that the referrals herein resulted in any additional jobs for ILA members. Nevertheless it is in my judgment reasonable to conclude, which I do, that increases in business for Jackson, thereby advancing and improving the viability of said company, have a tendency to produce additional work opportunities (such as overtime, less time on layoff, more regularity of employment) for ILA members, more moneys to be paid into ILA funds, and generally are supportive of the interests of the Union.

Moreover, the arrangement herein was carried out over a period of time of some 4 years, with all payments being made at the ILA's office, while Anastasio was actively involved in administering the collective-bargaining agreement then in existence between Jackson and the ILA. This is hardly conduct which one could characterize as an "individual frolic" or a "personal adventure."

Additionally, I note that Anastasio during this period of time was the second high ranking official of the ILA. Scotto, the ILA president and the highest ranking official of the Union, I find to have participated in or at the very least condoned the unlawful activity of Anastasio. Thus, the record reveals that Scotto in the fall of 1975 at the ILA office, in the presence of Anastasio, replied to Seregos' request for work by offering to help him obtain the U.S. Lines' account, discussed the commission arrangement, and suggested that Seregos use a foreign corporation to facilitate the payments. Shortly thereafter

[44] It is true that Seregos made the initial contact with Anastasio concerning representation of Jackson's employees, and that Seregos may very well have agreed to sign a contract with the ILA without any agreement for referrals. Indeed the record reveals that Seregos believed that his firm's becoming affiliated with the ILA would in and of itself produce more business for his Company. Nevertheless, the record establishes that the unlawful arrangement and the recognition were concurrently agreed to, and that Anastasio made it clear to Seregos that he would not refer any business to him unless he became and remained an ILA shop.

Seregos received a call from a U.S. Lines official notifying him to start work on a U.S. Lines vessel. Subsequently, work was performed by Jackson for U.S. Lines, and Seregos paid Anastasio 10 percent of the gross business on such work. These circumstances are sufficient to establish Scotto's participation in and at the very least condonation and approval of the arrangement entered into between Anastasio and Seregos.[45]

Accordingly, we have a situation where the two highest ranking officials of the ILA have participated in the scheme of referrals coupled with unlawful payments. It is hard to imagine what more should be required to establish union responsibility for this conduct. Is it necessary for all the Union's officers to have condoned the activity? Or must the executive board approve it? Or perhaps the union membership must vote to approve this conduct. In short, to carry Respondent's arguments to its logical extension, this kind of conduct can never be attributed to the Union, since the receipt of bribes or kickbacks is not in furtherance of any union's purposes. I do not believe that the law as to agency is so restrictive. As the Supreme Court has observed in a case involving kickbacks and the agency status of employer representatives:

> The Court of Claims, in holding that the Act does not authorize government cancellation because of kickbacks, relied heavily on its finding that none of the officers of Acme were aware of kickbacks. But as previously stated *those of Acme's employees and agents who did know were in the upper echelon of its managers.* One of the guilty employees was the general manager of one of the company's chief plants and the son of Acme's president, and the two other kickback receivers were in charge of operations, sales, and government contracts. They were the *kind of company personnel for whose conduct a corporation is generally held responsible.* Cf. *Gleason* v. *Seaboard Air Line R. Co.*, 278 U.S. 349. Since *Acme selected those agents to carry on its business in obtaining and performing government contracts, there is no obvious reason why their conduct in that field should not be considered as Acme's conduct, particularly where it touches the all-important subject of kickbacks.* [Emphasis supplied. *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138, 147 (1966).][46]

Accordingly, based on the above factors and analysis, I conclude that the evidence warrants the finding which I make that Anastasio and Scotto were acting as agents of the ILA in their participation in the arrangements for the receipt of concealed payments from Seregos acting on behalf of Jackson.[47]

Therefore by such conduct, Respondent Employer and Respondent Union have violated Sections 8(a)(1) and (2) and 8(b)(1)(A) of the Act, respectively, and I so find.

C. *The Alleged Midwest Piping Violations*

The complaint alleges that Respondents on or about September 13, 1979, executed a contract recognizing ILA as the representative of Jackson's employees at the Staten Island facility, containing a union-security clause, notwithstanding the fact that a real question concerning representation of said employees had been raised and was pending by virtue of requests for recognition made by IUMSWA.

In support of this contention, the General Counsel argues that Jackson's purchase of the Staten Island yard for $2.5 million, by which it acquired a facility including drydocks and cranes, enabled it to bid on combination jobs, and resulted in a large increase in business as well as the hiring of substantially more employees. Therefore, the General Counsel contends that these actions constitute substantial changes in Jackson's operations, resulting in essentially a new operation, which are sufficient to raise a question concerning representation of its employees, when coupled with IUMSWA's representational claims. In this regard, the General Counsel points to IUMSWA's historical interest in representing the employees at the Staten Island yard, the employment by Jackson of only former Brewer employees during the period immediately after its purchase of the yard, and its employment of 23 former Brewer employees, by October 25, 1979, when it was fully staffed.

Respondents, on the other hand, contend that the acquisition of the Staten Island yard by Jackson should be characterized as a relocation of its Brooklyn facilities, which did not result in a substantial change in the nature of its operations. Therefore, the contract which it executed in September 1979, modifying the existing collective-bargaining agreement between the parties, constitutes a bar to any petition being filed, and therefore precludes the existence of a question concerning representation at that time. Alternatively, Respondents argue that, even if the contract is not considered as a bar, IUMSWA's alleged claims for representation are insufficient to create a real question concerning the representation of the employees involved herein.

While the issue is not free from doubt, I am convinced that Respondents' analysis of the facts and the applicable precedents is more persuasive, and find that no question concerning the representation of Jackson's employees existed when the parties executed their agreement in September 1979.

In *Shea Chemical Corporation*,[48] the Board made it clear that the *Midwest Piping* doctrine does not apply in

[45] It is irrelevant that Scotto was not indicted criminally for his conduct involving Jackson and Seregos. The standard of proof necessary in criminal proceedings is quite different from the quantum of evidence necessary to establish a violation of the National Labor Relations Act. Moreover, I need not and do not find that Scotto actually received any of the payments from Seregos, as was apparently the charge in the indictments. I need only find, which I do, that Scotto was aware of, condoned, and approved Anastasio's activities in this regard.

[46] I would note that all the cases cited by Respondents (e.g., see fn. 43) involve low level employees, such as deliverymen and repairmen, and deal with one-time activities such as rape, assault, or a theft. On the other hand the instant case involves, as noted, a longtime continuing relationship encompassing conduct by the two highest ranking officials of the Union, which took place at the ILA's offices. To characterize such activities as "frolics" or "personal adventures" of Anastasio and Scotto is hardly an apt description of the circumstances herein.

[47] There is no dispute from any of the parties, as well there should not be, that Seregos was acting as an agent of Jackson in connection with his actions herein.

[48] 121 NLRB 1027, 1028 (1958).

situations where, because of contract bar or other established reasons, the rival claim does not raise a real representation question.

The Board in *General Extrusion Company, Inc.*,[49] and *Deluxe Metal Furniture Company*,[50] codified, expanded, and explicated its rules dealing with contract bar issues, several of which have significance in the evaluation of the facts herein.

The Board has consistently applied contract bar rules and principles, including those set forth in *General Extrusion, supra*, in unfair labor practice cases involving violations of Section 8(a)(2),[51] as well as Section 8(a)(5)[52] of the Act.

Thus, it becomes necessary to determine whether, as alleged by Respondents, their 1978–81 contract, as modified in 1979, constituted a bar to any representation claim that may have arisen by virtue of IUMSWA's demands.

The actual modification of substantive provisions of a contract by the parties during its term, whether or not the contract contains a modification clause, will not remove the contract as a bar, absent actual termination of the contract.[53] The General Counsel does not contest the fact that the parties' actions in 1979, of negotiating new terms and conditions of employment for some of its employees at the Staten Island facility, constitute a modification of their 1978–81 contract.[54]

I also find that the record overwhelmingly supports such a conclusion. It is clear that the parties intended the 1979 agreement to be a modification of the existing "blue book" agreement, which remained in effect as to 25 employees who were considered to be Jackson's "basic outside crew." Thus, the 1978–81 agreement was not terminated in 1979, but merely modified, and these modifications did not remove the contract as a bar.[55]

In *General Extrusion, supra*, the Board, as noted, revised and clarified certain aspects of its contract bar policy, particularly with regard to changed circumstances within the contract term. The Board observed therein in relevant part:

> Thus, we shall adhere to the rule that a contract does not bar an election if changes have occurred in the nature as distinguished from the size of the operations between the execution of the contract and the filing of the petition, involving (1) a merger of two or more operations resulting in creation of an entirely new operation with major personnel changes; or (2) resumption of operations at either the same or a new location, after an indefinite period of closing, with new employees. However, a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit, does not remove a contract as a bar. [121 NLRB at 1167–68.][56]

What is in dispute however, and what constitutes the determinative issue herein, is whether the actions taken by Jackson should be characterized as having changed the nature of the operations, involving a merger of two or more operations resulting in creation of an entirely new operation with major personnel changes, as alleged by the General Counsel, or "a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit," as alleged by Respondents.

I am persuaded that the record establishes that Jackson's purchase of the Brewer facility, and its consequent effect on its operations, should be characterized as a "*mere relocation*,"[57] under the *General Extrusion* standards.

An examination of the factors deemed controlling by the Board in *General Extrusion, supra*, on this issue, i.e., whether there is a change in the character of the jobs and the functions of the employees in the contract unit, reveals that the contract is a bar to any representation claim asserted by IUMSWA. Thus Jackson, notwithstanding the acquisition, is still engaged in the same busi-

[49] 121 NLRB 1165 (1958).

[50] 121 NLRB 995 (1958).

[51] *Clark Equipment Company*, 234 NLRB 935, 940 (1978); *Milton Kline and Jacob Kline a Co-Partnership, d/b/a Klein's Golden Manor*, 214 NLRB 807 (1974); *American Beef Packers, Inc.*, 218 NLRB 634 (1970); *Hayes Coal Co., Inc.*, 197 NLRB 1162 (1972).

[52] *Marine Optical, Inc.*, 255 NLRB 1241 (1981); *Westwood Import Company, Inc.*, 251 NLRB 1213 (1980); *Lammert Industries, a division of Componetrol, Inc., a subsidiary of I-T-E Imperial Corporation*, 229 NLRB 895 (1977).

[53] *Deluxe Metal, supra.*

[54] Indeed, the General Counsel stipulated into the record the findings of the art. XX decision that the 1979 agreement was a modification of the then existing collective-bargaining agreement. Moreover, the General Counsel, in his brief, refers to the parties' action in September 1979 as a modification of the prior agreement.

[55] It is of course true that the modifications also encompassed the changing of the expiration date of the old contract, thus constituting a premature extension of the 1978–81 contract. However, the Board does not prohibit premature extensions, but only subjects such extensions to the condition that if a petition is filed during the open period, calculated from the expiration date of the old contract, the premature extension will not be a bar. *H. L. Klion, Inc.*, 148 NLRB 656 (1964). Thus, a representation claim could have been raised 60–90 days prior to the expiration date of the 1978–81 contract. However, IUMSWA's claims were made in the spring of 1979, at a time when any petition filed would have been untimely with respect to such agreement. Cf. *Western Electric Co., Incorporated*, 94 NLRB 54 (1951).

[56] The Board in *General Extrusion, supra*, also set forth criteria to be utilized in expanding unit situations, requiring that a contract will be a bar only if at least 30 percent of the employees employed at the time of the hearing had been employed at the time the contract was executed, and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. This aspect of *General Extrusion* is not in issue herein, as the General Counsel concedes and the record discloses that this criteria was met, and that Jackson employed a representative complement of employees at the time the parties modified their contract and applied it to the Staten Island facility.

[57] I note in this connection that par. 11(e) of the complaint alleges that Jackson terminated its operations at Brooklyn, and *relocated*, said operations at the Staten Island facility, transferring all or most of its employees employed in Brooklyn who were represented by ILA. Similarly, the Regional Director in his dismissal letter with respect to IUMSWA's 8(a)(5) charge found that Jackson purchased the facility from Brewer to replace and supplant its Brooklyn facility, and that in September 1979 Jackson closed its Brooklyn facility and relocated to the former Brewer yard in Staten Island, taking with it its work force from Brooklyn.

ness performing essentially the same work, and is still operating its Hoboken machine shop, and performing pierside repairs at other companies' piers.

Most significantly, the employees at the new facility employ essentially the same skills and perform the same functions as they did at Jackson's Brooklyn facilities. See *Marion Power Shovel Company, Inc.*, 230 NLRB 576 (1977); *Electrospace Corporation of Puerto Rico*, 189 NLRB 572 (1971).

It is true as pointed out by the General Counsel that Jackson's new facility which cost $2.4 million now contains a drydock, which permits Jackson to bid on combination type jobs. Though the addition of the drydock has resulted in increases in the amount of work obtained by Jackson, the new work involved, bottomside work, comprises less than 10 percent of Jackson's business. Moreover, the dry dock has resulted in only two new classifications, that of dock hands and crane operators, which have been performed by less than 5 percent of Jackson's work force.

Of the remaining jobs and skills, there is no difference in craft complexity from Jackson's prior operations. Thus, bottomside and topside work require identical skills, training, and ability. There is no such thing as a bottomside or topside crew, and employees work interchangeably on repairs of both sides of the vessel.

It is apparent that the changes in Jackson's operations as a result of the purchase of the Staten Island facility were not of the magnitude contemplated by the *General Extrusion* rule.[58] I find, therefore, that Jackson's operations have remained substantially the same, following its relocation to Staten Island, since the move has not caused changes in the character of the jobs or the functions of its employees. *Marine Optical, supra; Westwood Import, supra; Pepsi Cola, supra; W. T. Grant Company*, 197 NLRB 955 (1972).[59]

The General Counsel places considerable reliance upon *Hudson Berlind Corporation*[60] in support of his position herein. While this case does contain some similarities to the facts at hand, I find that upon close examination there are several significant distinguishing factors which lead me to conclude that it is not dispositive of the issues before me.

In *Hudson Berlind* the respondent purchased two warehouses from different employers, one located at Floral Park and the other in Brooklyn. These warehouses were represented by different unions with different collective-bargaining agreements. Respondent from the outset of the purchase intended to merge both warehouses into a larger facility in Hicksville, Long Island, some 40 miles from Brooklyn.

While both prior collective-bargaining agreements were still in existence, respondent decided that he would deal with the union representing the Brooklyn warehouse (Local 222) for the new Hicksville location since the Brooklyn warehouse employed three times as many employees as the Floral Park warehouse. Therefore respondent signed a contract with Local 222 covering the Hicksville location before any employees were hired at that location. Subsequently, a majority of employees who eventually transferred to the Hicksville location came from the Local 222 represented Brooklyn warehouse. The Administrative Law Judge on these facts, applying the *General Extrusion* criteria, found the Hicksville operation to be a relocation of the Brooklyn warehouse, since a considerable proportion of employees were transferred and the jobs and functions were not changed. Thus, he found the contract with Local 222 to be a bar to any claims of the other union.

The Board reversed the Administrative Law Judge and found a violation of Section 8(a)(2), concluding that the newly established Hicksville facility was a new operation resulting from the closing of two warehouses and the establishing of an entirely new facility. The Board further found that:

> [the above facts represented] "a type of vice *Midwest Piping* was designed to prevent: the unilateral selection by an employer between conflicting representational claims of two or more unions, which thereby deprived the employees involved of their rights to have the question determined by the Board's processes, insuring their own freedom of selection." [*Id.* at 423.]

While these findings and the Board's language, set forth above, on their face seem somewhat applicable to the instant matter, a careful analysis of the facts and the Board's opinion reveal several significant distinguishing factors. Most importantly, in *Hudson Berlind*, Respondent combined and merged operations of two warehouses, each represented by different incumbent unions. As the Board found, "the newly established Hicksville facility was no more a part of or an accretion to the Brooklyn operation than to the Floral Park warehouse." *Id.* at 422. The Board was not impressed by the fact that a majority of the new facility was staffed by Local 222 employees, since at the time the contract was executed, neither union had "a conclusive or clearly predominant position." *Id.* at 422. Thus, contrary to the instant case, respondent in *Hudson Berlind* was faced with conflicting claims of two unions *currently* representing the employees to be transferred. Therefore, the Board found that the contract executed between Local 222 and respondent therein could not be a bar to any claims of the union representing the employees at the Floral Park plant. Additionally, also contrary to the instant case, the contract executed by the parties was found to be a prehire contract, since no employees had been hired at Hicksville at the time the contract was signed.[61]

[58] *Pepsi-Cola General Bottlers, Inc.*, 173 NLRB 815 (1968).

[59] There can be no dispute herein concerning the requirement in *General Extrusion* of the transfer of a considerable proportion of the employees to the relocated plant, since the complaint alleges and the record reveals that almost all of Jackson's employees relocated from Brooklyn to Staten Island.

[60] 203 NLRB 421 (1973), enfd. 494 F.2d 1200 (2d Cir. 1974).

[61] As noted, the contract herein was executed in September, after 95 percent of the employees hired were ILA members transferred from Jackson's other facilities. Contrary to the General Counsel, I do not believe that the increase in the number of regular employees hired after it began operations is sufficient to change the characterization of Jackson's move from a relocation to a new operation. See *Marion Power, supra; Lutheran Homes and Hospitals, Inc. d/b/a Fairlawn Care Center*, 233 NLRB 1025 (1977).

Accordingly, I find that *Hudson Berlind* does not alter my conclusion that Jackson's move to Staten Island from its Brooklyn facilities constitutes a mere relocation of these facilities,[62] accompanied by the transfer of a considerable proportion of employees, without an accompanying change in the character of the jobs and the functions of the employees in the unit, and that the parties' 1978–81 contract, as modified in 1979, constitutes a bar to any representational claim IUMSWA may have raised.

Turning to the issue of IUMSWA's claims, I conclude in agreement with Respondents that, even assuming that no contract bar were to be found herein, the claims raised by IUMSWA in the instant case do not rise to the level of a "real question concerning representation" of Jackson's employees at the Staten Island facility.

In this connection, it is necessary to determine whether IUMSWA's claims are "clearly unsupportable and lacking in substance."[63] In my judgment IUMSWA's claims can and should be so characterized. It must be noted that IUMSWA at no time made any claim or assertion to Jackson that it represented any of Jackson's employees. It never attempted to organize or solicit any authorization cards from Jackson's employees nor to present any evidence to Jackson of any support that it might have among Jackson's employees.[64] On the contrary, IUMSWA began to assert its alleged contractual and territorial rights with respect to the shipyard before Jackson began performing ship repair work, before it employed any bargaining unit employees to perform ship repair work, and before IUMSWA knew whether Jackson would be employing any former IUMSWA members. Thus, IUMSWA's claims herein were not based on the desires of any of Jackson's employees for representation by IUMSWA, but solely based upon the fact that it had been certified to represent employees of Brewer at the shipyard and that it had a successorship clause in its contract with Brewer. These kinds of claims, which are independent of and often contrary to the representational desires of the employees of the new employer, should not be held sufficient to create a colorable claim of representation. There is no such concept in Board law that a contracting union has a continuous right to recognition on the basis of location, regardless of the desires of the particular employees involved.[65]

The General Counsel places considerable emphasis upon the fact that from June through September, while Jackson was engaged in cleaning up and preparing the facility for its operations, the only employees employed by it were former Brewer workers. However, the evidence discloses that, during this period, Jackson (through Waterford Marine, its parent) employed only one former Brewer bargaining unit employee. The remaining former Brewer workers employed by Jackson were employed in supervisory or other nonbargaining unit positions while working for Brewer, thus affording no basis for any assumption or presumption that these individuals preferred IUMSWA as their collective- bargaining representative, and providing no support for any representational claims of IUMSWA. Moreover, the Board, in assessing 8(a)(2) cases, looks to a period of time when employees are engaged in regular production work, and not as here when employees are primarily engaged in cleaning up and preparing the premises.[66]

Therefore, I conclude that, between June and September, Jackson was not functioning as a production enterprise, and the employees were not part of a normal and functioning appropriate collective-bargaining unit. *Allied Products Corporation and its subsidiary, Kraus Manufacturing & Equipment Co., Inc.*, 220 NLRB 732 (1975). Thus, the fact that Jackson employed one former Brewer bargaining unit employee to perform electrical maintenance work, during this period of time, even where that individual was eventually hired by Jackson after normal operations commenced, is insufficient to create a colorable claim by IUMSWA to the representation of Jackson's employees.

The General Counsel also relies on IUMSWA's historical interest in representation of employees at the Staten Island shipyard, as creating a real question concerning representation, citing *Hudson River Aggregates, Inc.*, 246 NLRB 192 (1979), in support thereof. As I have already noted above, I do not believe that IUMSWA's "territorial claims," based on its prior recognition or contract with a prior employer, have any significance in assessing this issue, absent evidence of employee support for IUMSWA from Jackson employees. *Hudson River, supra*, is not to the contrary. There the Board found an employer to be a successor employer and in violation of Section 8(a)(5) of the Act because, among other factors, it actually hired a majority of the alleged predecessor's employees. The case does not stand for the proposition apparently advanced by the General Counsel that an unsubstantiated and invalid successorship claim[67] creates a real question concerning representation.

The complaint alleges a violation to have occurred in September when Respondents executed their modified collective-bargaining agreement extending recognition to the ILA. At this time, Jackson employed two bargaining unit employees who had been members of the Brewer bargaining unit represented by IUMSWA. The record does not reveal whether these employees were employed by Brewer at the time Brewer closed down its operations in May. The record does reveal a gradual winding down of Brewer's operations and layoffs of employees throughout 1979. Thus, it is conceivable that either of these employees may have had some interim employment be-

[62] The fact that Jackson's employees were transferred from two prior locations, into the one Staten Island facility, does not change the characterization of the move as a relocation, where the *General Extrusion* criteria have been met. See *The Arrow Company, A Division of Cluett, Peabody & Co., Inc.*, 147 NLRB 829 (1964).

[63] *Playskool, Inc., a Division of Milton Bradley Company*, 195 NLRB 560 (1972), enforcement denied 477 F.2d 66 (7th Cir. 1973).

[64] Cf. *Hudson Berlind, supra*, where the Board relied, in part, in finding the presence of a real question concerning representation upon the fact that the minority union was able to obtain a sufficient showing of interest from employees of the employer to support a representation petition.

[65] *Fraser & Johnston Company*, 189 NLRB 142, 150 (1971). See also *Schreiber Trucking Company*, 148 NLRB 697, 703 (1964).

[66] *Lianco Container Corporation*, 173 NLRB 1444, 1448 (1969); *Young & Greenwalt Co.*, 157 NLRB 408 (1966); *Fruehauf Trailer Company*, 162 NLRB 195 (1966).

[67] I note that the Regional Director dismissed IUMSWA's 8(a)(5) charges based on a successorship theory.

tween the time they were terminated by Brewer and employed by Jackson.[68] It is thus uncertain whether any presumption of support for IUMSWA as their bargaining representative with respect to Jackson can be made. However, I need not decide this issue, as I conclude that, even if it is assumed that these two employees of Jackson, in September, can be deemed to have designated IUMSWA to represent them with respect to their Jackson employment, by virtue of their prior inclusion in the IUMSWA bargaining unit, that in a bargaining unit of 51 on September 5, when operations commenced and out of 55 on September 13, the date the modification was executed, their presence is insufficient to create a real question concerning representation.[69]

I note that in each of the cases cited in the preceding footnote, where the Board found no real question concerning representation to be present, the unions involved presented claims of significantly greater substance, particularly in terms of employee support with respect to the employer involved, than the claims asserted by IUMSWA herein.

The General Counsel also relies upon the fact that, by October 25, Jackson had hired 23 employees who had been formerly employed in the Brewer's unit represented by IUMSWA. He argues that such a hiring could reasonably have been anticipated by the parties, as evidenced by the fact that they agreed to a reduction in contract benefits for a portion of the bargaining unit in contemplation of increased work opportunities for employees by virtue of the shipyard's facilities. The General Counsel cites *American Can Company*, 218 NLRB 102 (1975), enfd. 535 F.2d 180 (2d Cir. 1976), in support of his contention that these circumstances are sufficient to create a real question concerning representation of Jackson's employees. I do not agree with the General Counsel's analysis nor his reliance upon *American Can, supra*, as authority for his position.

In *American Can*, the employer for some 30 years operated a plant in Jersey City, New Jersey, wherein it had recognized the Steelworkers Union for its production and maintenance employees and the Amalgamated Lithographers Union (ALA) for a unit limited to lithographic employees. The employer announced plans to shut down the plant and move to another plant, and invited applications for transfer to the new plant. The ALA advised the employer that a majority of the lithographic employees desired to move to the new plant and to be represented by the ALA at such plant. The employer indicated that it preferred a single unit at the new plant and refused to recognize the ALA at the new facility.

When the new plant opened, lithographic work was still being performed at the Jersey City plant, but with the expectation that all such work would be transferred to the new facility. The employer signed a collective-bargaining agreement with the Steelworkers, for a unit including the lithographic employees, and then offered to transfer five ALA represented employees to the new plant on condition that they join the Steelworkers pursuant to the union- security clause of the contract.

In these circumstances, the Administrative Law Judge found no 8(a)(2) violation, reasoning that since the employer had no obligation to recognize the ALA at the new plant, ALA did not have a colorable claim to representation sufficient to raise a real question concerning representation.

The Board reversed, finding that the Administrative Law Judge confused the existence of a question concerning representation with its resolution, and thereby misapplied the doctrine of *Midwest Piping*. The General Counsel cites this language approvingly, in effect arguing that the dismissal of IUMSWA's successorship 8(a)(5) claims does not preclude the existence of a real question concerning representation. That is of course quite correct, and I do not quarrel with such a conclusion. However, it is still necessary for the IUMSWA to raise a claim that "is not clearly unsupportable and lacking in substance," and this in my judgment, it has failed to do.

The Board in *American Can*, on the basis of the ALA's long history of bargaining for lithographic employees in a separate unit at the old plant, the transfer of lithographic equipment and work to the new plant, the expected offer of employment to some of the lithographic employees, together with the ALA's repeated claim to represent these employees, found that a real substantial question concerning representation of these employees was created.

It is obvious that these facts are far different in significant aspects from the case at bar. Thus, unlike the ALA in *American Can*, IUMSWA herein had no history, long or otherwise, of collective bargaining in a unit of Jackson's employees. The Board, in *American Can*, relied heavily on this fact in finding that the employer unilaterally resolved a substantial representation question, i.e., the unit issue of separate representation for lithographic employees, based in part on a history of such representation in such a unit. No unit or other representation case issue has been presented by IUMSWA's claims which are resolvable by the Board's representational processes.[70]

I note in this connection that the Second Circuit in enforcing the Board's order in *American Can*, as set forth *infra*, made it clear that it was not endorsing the Board's practice of adhering to its approach to *Midwest Piping*, where such position has been rejected by several courts of appeals. The court enforced the Board's order however, primarily on the basis of ALA's bargaining history in a unit restricted to lithographers with *American Can*.

[68] This is less likely in the case of Boschi, who was employed by Jackson as of June in connection with the cleaning up and maintaining the facility.

[69] *Dillon's Companies Inc.*, 237 NLRB 759 (1978); *Robert Hall Gentilly Road Corporation, d/b/a Robert Hall Clothes, etc.*, 207 NLRB 692 (1973); *The Boy's Markets, Inc., and Food Employers Council, Inc.*, 156 NLRB 105 (1965).

[70] The only history of bargaining revealed in the instant record insofar as IUMSWA is concerned relates to the Brewer unit. Even if it can be assumed, which the record does not establish, that IUMSWA's demands can be construed as a demand for recognition by Jackson for a unit confined to former Brewer employees previously represented by IUMSWA, such a demand would not raise a colorable claim. Such a unit, clearly based solely on the extent of organization, is an inappropriate unit for collective bargaining, and therefore a claim for such a unit cannot create a real question concerning representation. *William Penn Broadcasting Company*, 93 NLRB 1104 (1951).

Thus, the court emphasized that the Board might have determined that a separate lithography unit was appropriate and have given the lithographers a choice between the ALA and Steelworkers. It distinguished the various court of appeals cases which refused to enforce Board orders in *Midwest Piping* cases, on the grounds that there was no showing in *American Can* that the Steelworkers represented a majority of employees in the *contested unit* i.e., a unit confined to lithographers, where in fact no lithographers had even been hired at the time the contract was executed. 535 F.2d at 186, 187.

Here there is no question as to the majority status of ILA in any conceivable appropriate unit,[71] and there is no history of IUMSWA bargaining for any unit of Jackson employees.

Moreover, the General Counsel's assumption that all these 23 employees would all be deemed to support IUMSWA in bargaining with Jackson is quite dubious. Thus, 21 of these 23 employees were not part of the original crew of Jackson employees hired at the shipyard, they were all hired after the modification contract was executed. These 21 employees were employed by Brewer in the IUMSWA unit, but such employment terminated by May at the latest.[72] Therefore, it is quite conceivable that some or all of these employees may have had interim employment with another employer between their layoffs from Brewer and their hire at Jackson. Thus, I find it difficult to presume in these circumstances that employees hired by Jackson on October 25, a minimum of 6 months after their terminations from Brewer, would still be deemed to support IUMSWA as their collective-bargaining agent with Jackson. Such a presumption, even if if could be made, is outweighed, rebutted, or at least neutralized by a more well-established presumption applicable to such employees. That is the well-settled principle that newly hired employees in the collective-bargaining unit are presumed to support the incumbent union (the ILA herein) in the same proportion as did Jackson's preexisting employees.[73] Therefore, I find, if anything, that these 21 former Brewer employees would be deemed to support ILA rather than IUMSWA or at worst might be deemed to support neither union. In no event does this record support a finding that they have designated IUMSWA to represent them in bargaining with Jackson.

Assuming, *arguendo*, that these 23 employees are presumed to be IUMSWA supporters in connection with their employment at Jackson, I find that their employment by Jackson by October 25 is still insufficient to create a colorable claim on the part of IUMSWA. Contrary to *American Can* and *Hudson Berlind, supra*, 21 of these 23 employees, at the time that operations began at the shipyard, had no reasonable expectation of being hired by October 25 or at any other specific time. Jackson had assured the ILA and committed itself to hire all its bargaining unit employees from its other facilities who wished to transfer, and to additionally offer jobs to those employees on layoff status.[74] Jackson had received some 500 applications for employment from outside sources, including 100 from former Brewer unit employees, which it intended to utilize and in fact did turn to, only after being unable to staff its facility from its own employees. Moreover, although Jackson did anticipate an expansion of work as a result of the opening of the new facility, it could not and did not in September know nor have reason to believe that such an expansion would have occurred by October 25, or any other particular date. In fact, the hiring of these additional employees was necessitated primarily because Jackson acquired one particular job which required expedited handling and the hiring of a large number of employees.

Since the General Counsel concedes and the record supports the fact that Jackson employed a representative complement of employees when it commenced operations and executed its modification of the contract, and a substantial majority of employees at the facility consisted of preexisting Jackson employees, represented by the ILA, any subsequent expansion of business even if anticipated by Jackson at the time the facility opened is immaterial. As the Board has held, "a determination of premature recognition cannot be predicated . . . on a possibility that future conditions may warrant an increase in personnel, or on the basis of an increase in personnel subsequent to the granting of recognition." *Hayes Coal, supra* at 1163.

The correct test is the *General Extrusion* criteria, which has concededly been met herein, and Jackson's expectation at the time of its purchase that future business conditions would permit it to increase its work force does not require a different result, even though that expectation was realized.[75]

The General Counsel's position herein, when examined carefully, runs contrary to the well-established principle that, assuming a representative complement is employed, employees are entitled to a determination of representational rights at the time operations commence.[76] Thus, the General Counsel would urge that on the basis of IUMSWA's demands, based on its invalid notions of ter-

[71] The General Counsel makes the rather puzzling argument that Jackson's recognition of the ILA At a time when no ILA members were employed in the yard establishes an 8(a)(2) violation. This contention is not encompassed by any allegation in the complaint, which alleges only the execution of a contract in September as a violation of the Act, and only because of the existence of a question concerning representation. The complaint makes no reference to the recognition in June or otherwise as a violation, nor does it make any reference to a lack of majority status of ILA at any time. Thus, I find Respondents not to have been on notice of this contention of the General Counsel and the issue was not fully litigated. In any event, since I have found the Staten Island facility to be a relocation of the Brooklyn facilities, it is immaterial that no employees were hired for that facility at the time the parties commenced bargaining for a modification of their existing contract. See *Pepsi Cola Bottlers, supra; Western Freight Association, et al.*, 172 NLRB 303 (1968).

[72] As noted above, the record reveals a gradual layoff of Brewer's employees, so that it may be that some or all of these employees were terminated by Brewer some months prior to May.

[73] *Marine Optical, supra; Mass. Machine & Stamping, Inc.*, 231 NLRB 801 (1977); *Lammert Industries*, 229 NLRB 895 (1977), enfd. 578 F.2d 1223 (7th Cir. 1978).

[74] Jackson had 300–400 W–2 forms from such employees which it used to staff its operations, and which it promised to and did exhaust before hiring from other sources.

[75] *Hayes Coal, supra; Lutheran Homes, supra.*

[76] *Lutheran Homes, supra; Lammert Industries, supra; Marine Optical, supra.*

ritorial jurisdiction and an unsupported successorship claim that Jackson should have refused to recognize and bargain with the incumbent ILA who represented a substantial majority of the employees at the shipyard, because of a possibility that Jackson might at some unforeseen future time hire employees who when employed by Brewer months before their potential hiring at Jackson were represented by IUMSWA, and might therefore wish to have IUMSWA represent them in collective bargaining with Jackson. Such a speculative defense by Jackson to a refusal-to-bargain charge would hardly be accepted by the Board, and should not be given any more credence when characterized by the General Counsel as creating a real question concerning representation under *Midwest Piping.*

Accordingly, I find that none of the factors cited by the General Counsel or otherwise appearing in the record, either singly or collectively, are sufficient to raise a colorable claim of representation on the part of IUMSWA.

The General Counsel, during the course of the hearing herein, contended that Jackson's unlawful payments to the ILA demonstrated "a proclivity to deal with the ILA," and was relevant to the *Midwest Piping* issue. No case authority or other argument was presented to support this assertion, and the General Counsel's brief makes no mention of this contention, suggesting perhaps an abandonment of such a position. However, since it has been raised and not formally abandoned, I deem it appropriate to consider such a contention.

Preliminarily, I know of no theory of Board law which relies upon a "proclivity to deal with a labor organization" to establish a violation of the Act. There is nothing unlawful about an employer wishing to continue to deal with an incumbent union when it relocates its plant, and I do not believe that the payment arrangement, as found above, although unlawful, is sufficient in and of itself to taint and invalidate the entire bargaining relationship between the parties. Thus, the evidence reveals no connection between the payments and the decision to recognize the ILA at the Staten Isalnd facility nor the decision to modify the existing contract between the parties. I note that the prior contracts between the parties were industrywide agreements, and the modification bargaining was conducted without the participation of any of the individuals involved in the payment scheme. Such bargaining was conducted with the participation of and ratified by unit employees, and consisted of numerous bona fide negotiating sessions with many heated and spirited discussions as well as the normal give and take of good-faith bargaining. Although the modification resulted in some reductions in benefits for some employees, such reductions were agreed to in exchange for the promise of increased employment opportunities and decasualization of work, which in fact has resulted from Jackson's move to the new facility. In addition, the contract, even as modified, contained higher benefits than the Brewer's contract, which was typical of pierside operations. Moreover, the parties pursuant to the reopening clauses in the agreement have subsequently bargained and raised the contractual benefits substantially for the unit employees. I find that the record indicates that, notwithstanding the existence of the unlawful payment arrangements, the employees of Jackson have received, at all times material herein, vigorous and effective representation from the ILA.

In my judgment, it would be inequitable, unwarranted, and unjustified to set aside this bargaining relationship solely on the basis of the unlawful payment arrangements.

Accordingly, I find that the existence of the unlawful arrangements herein have not been shown to have affected the parties' actions in agreeing to modify their contract and to extend it to the Staten Island facility, and I do not deem it appropriate nor proper to draw such an inference.[77]

I therefore find that Respondents have not violated the Act with respect to their activities in extending their contract to the shipyard, as alleged in the complaint, and I shall recommend dismissal of these allegations.

CONCLUSIONS OF LAW

1. The Respondent Employer, Jackson, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union, ILA, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents by entering into and carrying out an arrangement whereby Jackson made payments to the ILA based on a percentage of business referred to Jackson by the ILA violated Sections 8(a)(1) and (2) and 8(b)(1)(A) of the Act.

4. Respondents did not violate the Act in connection with their execution of an agreement in September 1979 covering employees at the Staten Island facility.

[Recommended Order omitted from publication.]

[77] Although I consider the parties' participation in the unlawful payment scheme to constitute serious violations of the Act, I believe that a cease-and-desist order would be an appropriate remedy for these violations, and the setting aside of their contract based on this conduct is not warranted. Cf. *Sweater Bee, supra,* where unlawful payments to a union were but one of the factors relied upon by the Board to rebut the presumption of majority status of the union, and to set aside an existing collective-bargaining relationship.